EXTRATERRITORIALITY IN CHINA[1]

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At the Conference on the Limitation of Armaments at Washington in 1921 one of the subjects considered at the request of the Chinese delegation was a proposal that the Western Powers give up their extraterritorial rights in China. This led to the adoption by the conference at its ninth meeting on November 29th of a declaration that the Western nations "are prepared to relinquish extraterritorial rights when satisfied that the state of Chinese laws, the arrangement for their administration and other considerations warrant them in doing so." This was doubtless a great gratification to the Chinese delegates, but the foreigner in China may have experienced less satisfaction at the menace therein involved to a system which tens of thousands of foreign residents in China regard as the *sine qua non* of their welfare.

It was resolved by the Conference to give effect to this declaration by establishing "a commission . . . to inquire into the present practice of extraterritorial jurisdiction in China . . . the laws and judicial systems and the methods of judicial administration in China," that this commission should be constituted within three months after the adjournment of the conference and should submit within one year of its first session its recommendations for legislation.

This promising start was not followed up; no commission was appointed, it being recognized even by the Chinese Government itself that China was not sufficiently advanced in judicial reform to justify so early an investigation. It was then suggested, after a conference with the Chinese Foreign Office, that the proposed commission should be ready to confer on November 1, 1924. This proposal still lacks approval of some of the Powers. There are, therefore, to be no immediate steps towards the abolition of foreign jurisdiction in China. As China, however, continues the revision of her legal code, it is probable that the Powers in the not distant future will be called upon to give their resolution effect.

No opinion can be formed in advance as to how well China eventually may meet the views of the Western Powers. Should the matter be up for decision today there could be only one verdict from an impartial observer of Chinese legislative and judicial conditions, and that would be that it would

[1] The words "*exterritoriality*" and "*extraterritoriality*" have no definitely agreed upon difference of meaning. There has been a tendency to use the former as connoting the privileges of ambassadors and their suites and the latter as connoting jurisdiction under treaty privileges as in China. In this article the form *extraterritoriality* will be used except where the form *exterritoriality* appears in quotations.

be criminal injustice to foreigners in China and an unfriendly service to China herself to place foreigners and their property under Chinese law. The fear expressed by Americans who have a stake there is that the conclusion in this matter may not be determined by an impartial observer. So mixed up with altruism, sentimental philanthropy and unsound commercial views is the American attitude towards China that the interest of those really concerned, the American business men, risk to be sacrificed to homemade considerations of international equity.

It is not surprising that this fear should be entertained. It is natural to think that a free country should rule every person who resides within its confines and should have the right to say that if one does not like its laws he need not go there. Also it is a natural sentiment for Americans to feel that the American Republic ought to be the first to recognize as an equal her sister Republic across the Pacific. These are fine sentiments and they would grace a Fourth of July oration in any town of the Middle West, but they do not commend themselves to those who have reason to be apprehensive of results.

There are few items in our relations with China that are less understood in America and more misrepresented than this question of extraterritorial jurisdiction. China has frequently denounced the system and foreign critics have often expressed their wonder that America, patron of self-determination, could hesitate to withdraw it. An investigation into the history of the doctrine, however, may change the conception that it was imposed on an unwilling China, that it was a new and onerous burden for that country, and that only virtuous feelings could be gratified by its abolition.

Let us consider what extraterritoriality is as a principle of international law; how it came to be applied in China by the United States; how it was received by the Chinese Government of that day and how it has operated in the more than eight decades since the first American envoys put it into their treaty.

In general terms extraterritoriality denominates "certain immunities from the application of the rule that every person is subject for all acts done within the boundaries of a state to its local laws."[2] In China in particular this system indicates the treaty privilege under which foreign consular jurisdiction has been there established and which operates to remove citizens of the treaty Powers from control of Chinese laws and officials and to place them under the protection of the laws of their respective nations. The main idea involved in extraterritoriality in China is that the defendant's nationality is in all cases to determine the law to be applied to the case and the judge to apply it.[3] For example, an American in China can only be prosecuted for a crime or pursued as a defendant in a civil action before an American court. Similarly for all other nationalities. If an American wishes to

[2] Encyclopœdia Britannica, article "Exterritoriality."

[3] C. T. Piggott, Consular Jurisdiction and Residence in the Far East.

proceed against a Chinese it must be before a Chinese court, or in the case of an Englishman or a Frenchman before an English or French court, etc., etc. The purpose of this is plain. It is to extend to foreigners in China the protection of their own laws. The reason for it was that Chinese laws and their method of enforcement were repugnant to the sense of equity of foreign Powers.

So deep in the minds of those accustomed to orderly government is the conception that the laws of a government should cover all within its territory that, when foreigners first went to China to trade it was accepted that China's laws should be applicable to them. This was particularly marked in the case of the Americans. The radical difference between Chinese and American laws, if understood at the time, might have shown this to be impracticable. The main principle of Chinese law is the doctrine of responsibility. Some one must be made answerable for every unlawful deed; the lower official is responsible to the higher, the higher official is responsible to the Emperor.

> A theft is committed in a village; the village is held responsible, jointly and severally, and with the village its *tipao*, the official head. A commits suicide on B's doorstep; B is held responsible. The Yellow River bursts its banks; the Governor of Honan begs the emperor to deprive him of his titles, since he is responsible. A bankrupt absconds; his family are held responsible in body and estate. A shopman strikes a blow and goes into hiding; his employer is held responsible for his appearance. A province is overrun by rebels; its governor is held responsible. A murder is committed in a town; the magistrate of that town is held responsible for the discovery and arrest of the murderer, for getting up the case for the prosecution, for trial and judgment, and for the execution of the guilty man; to fail in any one of these responsibilities may well lead to his being cashiered. The result is that nothing which occurs goes unpunished; if the guilty person cannot be found, convicted and punished, then the responsible person must accept the consequences—father, family, employer, village magistrate, or viceroy.[4]

The effect of this was in practice that for every crime there must be a victim of justice, and it did not much matter whether or not this victim was guilty; any victim would be better than none, and he might be a person who had no responsibility whatever. There were several striking incidents of the carrying into practice of this feature of Chinese law against foreigners. In the year 1821 at Whangpoa near Canton an Italian sailor on the American ship *Emily* was charged with having killed a woman in a boat alongside by accidentally dropping a jar overboard. The Chinese demanded delivery of the accused for trial and, after some proceedings, directed only to conviction, the accused was strangled by order of the tribunal. Similar instances involving British, French, Portuguese and other foreigners occurred from time to time. This might have opened the eyes of the American Government to the advisability of demanding an impartial hearing officially of

[4] H. B. Morse, International Relations with the Chinese Empire, p. 114.

those accused of crime, but the Americans for years consistently held the attitude that while they were in the waters of China they were bound to submit to her laws.

The fact is that in the pre-treaty days of foreign intercourse with China, trade was the only consideration. Foreigners sacrificed all personal considérations to secure permission to trade. The Chinese thus became convinced not only that foreigners would submit to any treatment if their trade were not interrupted, but that foreigners were themselves utterly refractory to reason. Mr. Morse in the work above cited, quotes from a Chinese writer of early times the Chinese maxim in dealing with foreigners, namely: "The barbarians are like beasts and not to be ruled on the same principles as Chinese. Were one to attempt to control them by the great maxims of reason it would tend to nothing but the greatest confusion. The ancient sovereigns well understood this and accordingly ruled barbarians by misrule. Therefore to rule barbarians by misrule was the true and best way of ruling them."

The foreign traders at Canton were in fact subjected to humiliating regulations. They were treated as wayward children under constraint and their daily life was controlled by arbitrary rules. As one writer expressed it, they lived in comfort "in a gilded cage." They were not allowed to have women or arms in their quarters; they could not borrow or lend money; Chinese, in order not to degrade themselves and their country, were forbidden to act as their servants; they could not row for pleasure on the river, nor go for walks unaccompanied by Chinese guardians; they were forbidden to use sedan chairs, the usual Canton vehicle, etc., etc. But so essential was it for purposes of trade to keep on good terms with the officials that this treatment was accepted and a powerful weapon thus put into Chinese hands: a threat to cease trading was an effective answer to every remonstrance.

As the early American officials became aware of the above maxim and its method of application, it is not surprising that when, under foreign guns, China was brought into treaty relations with the Western Powers and led to admit their physical superiority, jurisdiction over American citizens in China was reserved. Accordingly, when Caleb Cushing, first American Minister to China, signed the first Chinese-American treaty at Wang-hea on July 3, 1844, extraterritoriality was made a provision thereof under the following two articles:

Article XXI

> Subjects of China who may be guilty of any criminal act towards citizens of the United States shall be arrested and punished by the Chinese authorities according to the laws of China, and citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the Consul or other public functionary of the United States authorized according to the laws of the United States; and in order to the prevention of all controversy and dissatisfaction justice shall be equitably and impartially administered on both sides.

Article XXV

> All questions in regard to rights, whether of property or person, arising between citizens of the United States in China shall be subject to the jurisdiction of and regulated by the authorities of their own Government; and all controversies occurring in China between the citizens of the United States and the subjects of any other Government shall be regulated by the Treaties existing between the United States and such Governments respectively, without interference on the part of China.

This treaty was followed by treaties, with similar provisions, between China and France, England and other Powers beginning in 1858, until extraterritoriality was a feature of all Chinese treaties with Western Powers. It is to be noticed that Japan was not among the early signers of such a treaty.

The American treaty of 1844 was the first modern treaty in which extraterritoriality was definitely provided for. America was not, however, the first Western Power to exercise control over its nationals in China. England, as early as 1834, when the control of the East India Company over English trade with China was abolished, established a court of criminal and admiralty jurisdiction to be held on board any British ship at Canton to hear cases involving British subjects. Even in the old Canton days English merchants were granted jurisdiction over their foreign servants. Russia, as will be seen below, had by still earlier treaties control of her subjects on the frontier.

After the treaties of 1858 had been in operation for some years, apologists for China, not only Chinese but foreign friends, began to feel that China had been imposed upon and had involuntarily entered into contracts which inflicted some hardships upon her. T. Z. Tyau, a Chinese legal authority, in his book *The Legal Obligations Arising out of Treaty Relations Between China and Other States* has this comment to make: "To the lay mind these privileges known as extraterritoriality assume an importance transcending that of all other grants; to the student of international law they constitute a positive derogation from the prerogatives of the territorial sovereign." Also Dr. Williams, a prominent American missionary, is more emphatic in the following statement. At page 659, Vol. II of his great work, *The Middle Kingdom*, he says:

> The year 1858 was fraught with great events, involving the welfare of the people of China and Japan and their future position and progress. Much against their will they had been forced into political relations with Europe and America, and in a measure deprived of their independence under the guise of treaties which erected an *imperium in imperio* in their borders. Their rulers, ignorant of the real meaning of these principles of ex-territoriality, were tied down to observe them, and found themselves within a few years humbled before those of their own subjects who had begun to look to foreigners for protection.

As investigation could demonstrate, such criticisms are not well founded. The fact is that the Chinese treaty negotiators had some grounds to know

what extraterritoriality meant, and we have the testimony of an eye-witness to signing of the English treaty of 1858, "that there was no surprise on the one hand nor concession on the other when extraterritoriality was established by the treaties of 1858." [5]

It is not fair to argue that Chinese statesmen of the first treaty days knew that extraterritoriality was a feature of international law from early ages. Foreign international law was not in their curriculum. It is beyond the scope of this article to go into detailed reference to this feature of international relations in Europe in the Middle Ages and in ancient times, but it is interesting to note, briefly, that extraterritoriality in the Middle Ages was not considered at all a derogation of sovereignty, and different degrees of extraterritoriality were the rule rather than the exception. The clergy were under their own laws. The Jews were under a separate jurisdiction. The free cities of Europe had privileges for their citizens in foreign ports. In their relations with the ancient Mediterranean States, of which, however, we must acquit Chinese statesmen of any knowledge, extraterritoriality was recognized. The Republic of Venice in the year 1199 closed a treaty with the Emperor Alexius of Constantinople, providing for extraterritorial treatment of Venetian subjects in Greece. A similar treaty was made a century later. Other treaties of a like character were made with Pisa and Florence in 1154 and 1445. The capitulations with Turkey entered into by the various foreign Powers, including America, antedated the Chinese treaty. In old Japan the principle of extraterritoriality was not unknown. Certain *daimiates* there enjoyed almost complete home rule.

With the above history the Chinese statesmen may have been unfamiliar, but those who signed the treaty with the United States in 1844 may be charged with more knowledge of extraterritoriality from their own history than Dr. Williams' statement above would seem to attribute to them. There are many instances of a jurisdiction resembling extraterritoriality in the history of China herself. The Buddhist and Taoist priesthood in Peking for centuries has been subject in certain matters to priestly courts.[6] To a certain extent the Miaotzu and the Lolo tribes entering into Southern China brought with them their own legal customs. From the beginning of the Manchu dynasty to the days of the Republic there have been distinctions between Chinese and Manchus before the law which suggest extraterritorial privileges. Between China and Russia in the seventeenth and eighteenth centuries extraterritorial jurisdiction over their respective subjects was established in an explicit way.

Article II of the treaty of 1689 between Russia and China provided:

> *Que s'il arrive qu'une ou deux personnes de petite conséquence fassent quelques excursions au-delà des limites, soit pour chasser, soit pour voler ou piller, on les prendra aussitôt, et on les menera aux Gouverneurs et aux*

[5] The Life of Sir Harry Parkes, Vol. 2, p. 314.

[6] J. J. M. de Groot, Sectarian and Religious Persecution in China, Vol. 1, pp. 102, 103.

Officiers établis sur les frontières des deux Empires, et les dits Gouverneurs informés de la qualité du crime, les puniront comme ils le mériteront.[7]

The Russo-Chinese treaty of October 21, 1727, Article X, contained this provision: "*Ceux qui passent la frontière et volent des chameaux ou du bétail seront remis à leurs juges naturels.*" [8]

The fact is that, notwithstanding the claims of modern Chinese publicists that China had had imposed upon her a system which she did not understand, the Chinese knew as much of it as they cared to know and were willing enough to abandon to foreign officials control of an element of the population which they regarded as not amenable to reason and which they were admitting to their country only under armed pressure.

It seems never to have been the extraterritoriality in principle to which Chinese statesmen objected but the incidents of conflict under it. In the thirty and more years of the writer's acquaintance with China the foreign merchant has always been welcome, and the missionary was not opposed on account of his faith but on account of the friction which his keen spirit of evangelism aroused in remote places. On one occasion years ago, in the writer's presence, when the Ministers of the Tsungli Yamen—as the Chinese Foreign Office was then called—had listened with respectful attention to an explanation of missionary activity by an eloquent Welsh missionary, the fine looking Chinese Premier, bowing his grey head thoughtfully over the table, said, "We have no objection to the missionary; if we could have the missionary doctrine without the missionary cases all would be well." In the early treaty days Prince Kung, then head of the Chinese Foreign Office, said to the British Minister, "Take away your opium and your missionaries and you will be welcome."[9]

It is probably true that neither the Chinese nor the foreign negotiators realized the extent to which foreigners and their trade were to come to China under extraterritorial protection. The world has seen the cabbage patches in the fields near the Chinese ports of Shanghai, Tientsin, Hankow and elsewhere, granted by China as residence and business sites for foreigners, grow into the great commercial cities of today where, under protection of foreign law and order, a gigantic commerce has developed and within the confines of which thousands of Chinese have found a profitable and secure abode, and to which even to this day fugitives from the rigors of Chinese law fly for refuge. The foreign concessions, as they are called, are clean, wholesome, with well-built homes and the conveniences of modern life. They are at the same time a lesson and a reproach to China. These communities exist and flourish because extraterritoriality guarantees liberty and property there, and before these guarantees are removed the Western world would be wise to provide that equal privileges will be given under Chinese rule.

[7] Treaties between China and Foreign States, Vol. I, 2d ed., p. 5.

[8] *Ibid.*, p. 36.

[9] These from the *Land of Sinim*, by Sir Robert Hart, p. 68.

It is not only the Chinese but the foreign negotiators who did not realize what they were creating by extraterritoriality. A story is told at Shanghai, now a modern city of half a million and more inhabitants, with fire department, police, tramways, trackless trolleys, waterworks, parks, gardens and hundreds of miles of paved roads, to the effect that at a rate-payers' meeting of the municipality's early days the question of road construction came up, and it was unanimously agreed that Shanghai needed only roads wide enough for a coolie to carry tea boxes through them. The same municipality is now spending thousands of dollars annually to widen those early lanes. In the same way the restrictions of extraterritoriality have been outgrown; foreign trade resents its limitations. It is probable that had the earliest foreign treaty negotiators known what was to happen under the provisions of those treaties, the articles under consideration would have been differently couched. It is even to be imagined that extraterritoriality might have been omitted from them and the foreign negotiators might have insisted that foreigners should be admitted under Chinese law and that the law should be modified to make this possible. Under such circumstances progress might have been very great. It is even possible to imagine that we could have enforced such improvements in Chinese jurisprudence as to be a blessing to the Chinese themselves and to have removed the barrier that now exists between the foreigner and the Chinese. We might have done better thus than we have done by leaving the Chinese legal system and the foreign to go on side by side without encouragement to one nor to the other to adapt itself to the necessities of both.

As a matter of fact we do not now find extraterritoriality working entirely satisfactorily. It has led to the continuance in China side by side of American courts, British, Japanese, French, German, Portuguese, etc., courts, in fact one for each treaty Power. We have a great variety of codes in operation in one country. There is no possibility of developing a law based on judicial decisions because there is no validity in a legal decision except in the court which pronounces it. The Chinese merchant in legal controversies with his foreign customers must seek redress in any one of the dozen or more courts to which said customer may be subject. A decision in one court today will give no clue as to how an identical controversy may be decided in another court tomorrow.

The most violent partisan of maintenance of foreign rights in China must admit that there is room for reform. The request for this reform cannot, as above intimated, be based on any allegation that the Chinese treaty negotiators were deceived or bullied, but on the real interests of all parties to the treaties. This reform should not take the form of a rude abolition of extraterritorial jurisdiction before a substitute therefor has been perfected, but there is reason enough to say to the Chinese Government, that it is right in wanting to get rid of the present system. The steps towards the establishment of Chinese full jurisdiction may be long and slow but they need not be

impossible—patience and mutual yielding must characterize the operation. There would be needed a code founded on foreign judicial practice and covering the needs of foreign litigants of whatever nationality; then a system of courts to carry out the execution of this code; then a time of probation with foreign expert judicial coöperation in training the magistrates of these courts. It is evident that the plan must be tentative; the builders of the new system must adjust their work to difficulties as they arise; but intelligently handled there is no inherent reason why we should not have after some decades a creditable administration in China of laws adapted to the requirements of the Chinese and of the foreigners there resident, and a consequent freeing of trade and residence from the present cumbrous embarrassments of extraterritoriality.

FOREIGN JURISDICTION IN CHINA

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Because of the deficiencies in her laws and judicial administration, China has for eighty years passively accepted the arrangement, sanctioned by treaties, under which foreigners found within her territory are clothed with extraterritorial rights.[1] The privileged status thus accorded to foreigners virtually established in that country an anomalous system of foreign jurisdictions. Now that the Chinese laws and judicial machinery are being improved in accordance with modern requirements, what was once a Chinese attitude of silent acquiescence toward the restriction of sovereignty has today become one of active and energetic protest against its further continuance.

The expression of the desire on the part of China to have the limitation upon her judicial independence withdrawn is, of course, a simple and easy matter. But whether that desire is capable of being translated into positive action is a question not to be so easily disposed of. With the formal adoption by the Washington Conference of the resolutions aiming toward the abolition of extraterritoriality in China, it was then generally felt that a most gratifying beginning had been achieved by China toward the eventual realization of her national aspiration. But two years have elapsed with the resolutions remaining what they were when they were signed. Because of the utter impotence of the central government to make its authority felt and respected throughout the land, China has repeatedly requested the postponement of the arrival in that country of the proposed international commission provided by one of the Washington resolutions. Although a sum of $200,000 has been appropriated by the Chinese Government to defray the expenses of the forthcoming investigation,[2] it does not appear altogether advantageous to undertake now the execution of the decisions reached at the conference while political conditions in China are so unfavorable.

Aside from the circumstances adverse to a judicial investigation, one is led to inquire into the actual judicial progress that has been attained and claimed

[1] Exemption from Chinese territorial jurisdiction is enjoyed only by nationals of states with which China has conceded this privilege by treaty. See Koo, The Status of Aliens in China, Ch. VI.

[2] North China Herald, Oct. 28, 1922, p. 210. There is much uncertainty as to when this investigation is to take place. France, on the 8th of January, declined to name a delegate to the proposed commission to visit China as provided by the Washington Conference, on the ground that China has not yet agreed to pay the Boxer indemnity in gold francs, China having sought to pay in paper francs. New York Times, Jan. 9, 1924, p. 21.

by China. It is on this basis alone that we might hope to solve the intricate problems directly concerning the abolition of extraterritoriality. And then, too, it is also on this basis that one may profitably gauge and determine China's capability in fulfilling within a reasonable time the requirements for the recovery of her judicial rights. With the actual legal and judicial reforms ascertained, the problem of formulating a definite scheme for the relinquishment by the treaty states of extraterritorial rights would be made less perplexing.

Until 1902 no honest attempt had been made by China to nullify in any way the limitation imposed upon her territorial jurisdiction. But when her progressive island neighbor, Japan, by adapting and harmonizing her legal and judicial systems to western standards, regained in 1899 the right to complete jurisdiction over foreign residents, China then manifested a similar desire. Accordingly, she induced Great Britain to recognize her aspiration in the following language as contained in Article XII of the so-called Mackay Treaty of 1902:

> China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations, Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extraterritorial rights when she is satisfied that the state of the Chinese laws, the arrangement for their administration, and other considerations warrant her in so doing.[3]

By incorporating in their commercial treaties with China a similar pledge, the United States and Japan in 1903, and Sweden in 1908, further promoted the initial efforts of China to westernize her judicial system. With such encouraging expressions of sympathetic support the outlook of eliminating the objectionable jurisdictions within a reasonable time was, indeed, promising.

But the satisfactory solution of the problem was not destined to be so simple as it appeared. After having made known her desire, China made no headway in the rehabilitation of her judiciary. Consequently, the problem remained practically untouched. Under the republican régime, however, China claims to have "made considerable progress in the administration of justice";[4] but whether or not those elemental conditions so essential to the ordinary protection of life and property have been adequately assured by the projected reforms will furnish an interesting field of investigation.

It is perhaps misleading to state that China made no serious effort towards introducing a modern legal and judicial system into the country. Inasmuch as the proposed changes involved a radical departure from the established

[3] MacMurray, Treaties and Agreements with and concerning China, Vol. I, No. 1902/7, p. 351.

[4] The Shantung Question: A Statement of China's Claims together with Important Documents Submitted to the Peace Conference in Paris, 1919, reprinted by the Chinese Welfare Society in America, p. 162.

practices of dispensing justice throughout the land, it naturally required time before her desire, as expressed in 1902 and 1903, could be translated into action. And it was not until after the conclusion of the Russo-Japanese War, in 1905, that earnest steps were taken to institute the necessary reforms. In that year a commission under Dr. Wu Ting-fang and Shen Kia-pen was constituted for that purpose. However, the execution of the reforms was slow and uncertain,[5] and whatever progress has been made in that direction was attained during the past ten years under the Republic.

Briefly stated, China has "adopted a National Constitution prescribing, among others, the separation of governmental powers, assuring to the people their inviolable fundamental rights of life and property and guaranteeing the complete independence and ample protection of judicial officers and their entire freedom from interference on the part of the executive or legislative powers."[6] "Three grades of new courts have been established, namely: District Courts, High Courts or Courts of Appeals, and the Taliyuan or Supreme Court in Peking," supplemented by a system of procurators of three corresponding grades. There are, among the improvements in legal procedure, "the complete separation between civil and criminal cases, the publicity of all trials and judgments rendered," a system of legal counsel, and the non-employment of corporal punishment to coerce confessions. The prison and police systems have been reformed and improved;[7] and, finally, "five codes have been prepared, some of which have already been put into force: (a) the Civil Code, still in course of revision; (b) the Criminal Code, in force since 1912; (c) the Code of Civil Procedure, and (d) the Code of Criminal Procedure, both of which have . . . been promulgated; and (e) the Commercial Code, part of which had been put into force."[8]

Altogether these reforms add an inspiring and novel chapter to the legal and judicial history of China. In view of the fact that this has been accomplished under the most trying conditions of political instability, great credit is due to China for the extraordinary advancement made in this direction.

Although what has been achieved in the reforms are in themselves indicative of China's ability to reach her goal eventually, there is much speculation as to the actual administration of the new laws. Has China established a national judicial system capable of dispensing justice according to the spirit and standard of the West? Vital facts pertaining to this point seem to be

[5] The results of the commission's labors were vigorously attacked and eventually shelved by the opposition of influential viceroys in the provinces because of the novelty of the legal code which had been drawn up.

[6] The latest Chinese Constitution, promulgated on October 10, 1923, contains provisions not dissimilar to those dealing with the same subjects found in the provisional Constitution of 1912. Articles 4 to 21 of Section 4 deal with the rights, duties and privileges of citizens; Section 9 (articles 97 to 102) with the judiciary; and Section 10 (Articles 103 to 108) with the law. China Weekly Review, Oct. 20, 1923, p. 269; North China Herald, Oct. 13, 1923, p. 84.

[7] The Shantung Question, etc., *op. cit.*, pp. 162–3.

[8] Senate Doc., No. 126, 67th Cong., 2nd sess., p. 476.

lacking. It is, of course, not to be expected that corresponding progress has been attained in the administration of the laws. China has frankly admitted the many imperfections arising from her brief experience in this direction.[9] But she has now the necessary laws which, if justly and honestly administered, will protect adequately the interests of individuals. The relinquishment by the treaty states of their extraterritorial rights at an early date will depend solely upon the attainment of that condition.

It is, however, not so sure that China alone could bring about those conditions so essential to the efficient administration of the law. In remodelling an institution or a system on a Western pattern, and proposing to bring it into accord with Western practice, China must needs invite the coöperation of Western Powers. The necessity for international aid is all the more pressing and cogent when consideration is given to the fact that the consent of the Powers is requisite to the suppression of extraterritoriality in China. Happily, by action of the Washington Conference the eight participating Powers, all of which are treaty states, not only are pledged to establish an international commission "to inquire into the present practice of extraterritorial jurisdiction in China, and into the laws and the judicial system and the methods of judicial administration of China, with a view to reporting to the Governments of the several Powers . . . their findings of fact in regard to these matters, and their recommendations as to such means as they may find suitable to improve the existing conditions of the administration of justice in China"; but also "to assist and further the efforts of the Chinese Government to effect such legislation and judicial reforms as to warrant the several Powers in relinquishing, either progressively or otherwise, their respective rights of extraterritoriality." [10] As a protective measure it is further provided that "in no case shall any of the said Powers make its acceptance of all or any portion of such recommendations (of the commission) either directly or indirectly dependent on the granting by China of any special concession, favor, benefit, or immunity, whether political or economic." [11]

Now this most important resolution, if carried out in the same spirit as it was formulated and adopted by the conference, should reduce to a minimum whatever retarding influences that may arise from international indifference, inaction, or interference, and should provide China with a maximum degree of freedom and choice in readjusting her judicial administration in accord with the standard of efficiency obtaining in the more advanced countries of the West. An examination of her new legal codes will convince any one that China possesses laws quite as scientific and humane as any in the West.[12] It

[9] The Shantung Question, *op. cit.*, p. 162.

[10] Senate Doc., *op. cit.*, p. 514.

[11] *Ibid.*, pp. 514–15.

[12] See C. H. Wang's "Revision of the Chinese Criminal Code," 13 Illinois Law Review (1918–1919); also Wenfu Yiko Hu's "Progress in the Chinese Administration of Justice," 6 Philippine Law Review, 98.

remains, therefore, a question whether or not China will take full advantage of the present opportunity by administering these codes in such a manner as to win the respect and confidence of the treaty states.

It is, however, not to be overlooked that the Washington resolutions failed to dispose of the proposal to abolish extraterritoriality. Ways and means have yet to be devised for that purpose. In all probability the findings and recommendations of the international commission that is to visit China will consider a workable scheme and how it should be executed.

In discharging its delicate responsibilities the commission will find China's viewpoint towards the irritating subject of extraterritoriality entering into its considerations quite prominently. This is only natural. For, aside from the question of the inherent and practical defects of the system, China would desire a settlement compatible with her national interests. And, consequently, she will press for a clear understanding of the Chinese position. This phase of the question may be better appreciated when the fact is acknowledged that it is China which will be the subject of experimentation—that is, her judiciary is to be radically changed to meet the requirements of the treaty states. An adequate understanding of the Chinese viewpoint is the key to the equitable solution of the problem.

Why China should resent so strongly the system of extraterritoriality and should advocate so energetically its withdrawal in recent years may be traced to the rapidly growing national consciousness—a most potent factor in the present rejuvenation of the country. Any impediments or limitations imposed upon her freedom of sovereign action are certain to arouse obstinate resistance. Inasmuch as extraterritoriality falls within such limitations, not only as fettering her sovereignty but viewed as having been extracted by force, it has become an object of national protest. The causes which occasioned its introduction and establishment in China have been brought under careful scrutiny since 1904. Herein lies the explanation for the movement of judicial reforms and some of its extraordinary achievements of recent years.

Yet a due appreciation of the intensity of that moral force which induced the treaty states to acknowledge this particular Chinese aspiration may not be gained without undertaking a brief review of how the Chinese people have come to hold their present attitude towards the question of extraterritoriality.

The history of extraterritorial jurisdiction in China dates back to the Chinese-British supplementary treaty of 1843.[13] The provision in question constituted the original basis upon which foreigners in China legally withdrew their submission from the operation of the territorial control of China, although it was left to the Chinese-American treaty of Wanghea, 1844, to supply explicitly the principles of extraterritoriality,[14] which became the model

[13] Article XIII. See Treaties, Conventions, etc., between China and Foreign States, Vol. I, p. 388.

[14] Articles XXI, XXIV, and XXV.

for similar provisions in subsequent agreements between China and other foreign states.

China was most reluctant to surrender her jurisdictional authority over resident foreigners. Theretofore all of them, irrespective of their mission or object in China, had been amenable to, and fully recognized, her territorial sovereignty. Never in her history had she failed to insist upon the exercise of complete jurisdiction over all foreigners found within her dominion.[15] True, it has been pointed out that in the ninth century the Arab community at Canton enjoyed the privilege of being governed by a representative chosen from among its own members. But, in this instance, Chinese laws and authority prevailed in all cases, and the arrangement existed purely by sufferance and not as of legal right.

As late as the sixteenth century the Chinese policy toward foreigners and foreign intercourse was quite liberal. There were no laws restricting their movements within the empire or regulations impeding their trade. But when the Portuguese arrived off the southeastern coast of China during the first quarter of the sixteenth century and committed acts which struck directly against the morals, peace and authority of the empire, they compelled the Chinese to reverse the good opinion formed of "the peoples from the West." [16] Henceforth, all Europeans were treated with a degree of suspicion and exclusion that had not been deemed necessary to be exercised toward their peaceful and self-respecting predecessors.

The Spaniards following the Portuguese were no better. After their conquest of the Philippine Islands in 1543, they instituted two wanton and indiscriminate massacres of Chinese settlers and traders, one in 1603 and the other in 1662, to the appalling number of some twenty odd thousands.[17] This sort of treatment meted out to these inoffensive Chinese could not but influence adversely the changing character of the new Chinese policy towards foreign intercourse.[18]

The Dutch heralded their arrival in the Far East by a naval attack on Macao, a Portuguese settlement on Chinese territory.[19] The naval enterprise being unsuccessful, they proceeded northward and seized the Pescadore Islands. Here they maltreated the natives, subjects of China, with extreme severity, and fortified the place without the slightest formality.[20] There had

[15] In the Treaty of Nerchinsk (1689) with Russia, China agreed to deliver over to Russian officials stationed on the Russian side of the border any Russians caught committing acts of violence on the Chinese side. The arrangement was, however, based on the principle of reciprocity.

[16] Davis, China and Its Inhabitants, Vol. I, p. 20; Williams, The Middle Kingdom, Vol. II, p. 427.

[17] Inaba, History of the Tsing Dynasty (in Chinese), Vol. II, p. 59; Morse, International Relations of the Chinese Empire, Vol. I, p. 16.

[18] Williams, *op. cit.*, pp. 432–3.

[19] *Ibid.*, p. 433; Douglas, Europe and the Far East, p. 19.

[20] Liu, Recent History of the Foreign Relations of China (in Chinese), p. 4.

been no quarrel nor even any cause for this belligerent conduct; and no state of war existed, unless the lease of Macao to the Portuguese by China could be construed as a *casus belli!* [21]

Finally, the appearance of the English in Chinese waters only confirmed the growing suspicion of the Chinese that all Europeans were bent on violence, plunder and conquest.[22] While the English made less use of force to gain their objective, that of trade, they were none the less considered *persona non grata*; for from the very beginning of their arrival, their commercial competitors—the Portuguese—launched against them a campaign of invidious misrepresentation, slandering them as "rogues, thieves, beggars and what not." [23]

In view of these unpleasant incidents, occurring by no means as isolated instances during this early period of maritime intercourse, China was prompted by the instinct of self-preservation to restrict within the narrowest limits her contact with the people from the West.[24] Retrospectively, China committed a fatal mistake in foreign policy. Closing her ports as the most efficacious means of compelling these newcomers—unscrupulous adventurers and fortune-hunters as they were—to respect her independence and authority was, from the outset, a dubious expedient. Although China was within her right in imposing whatever regulations she deemed necessary to safeguard her national safety and interests, that policy only invited increased pressure from without. Consequently, the ensuing friction between China and the West, as represented by the Chinese provincial officials, on the one hand, and the European traders on the other, led unfortunately to the breeding of national prejudice, enmity and jealousy, and, eventually, to strained relations, culminating in armed hostilities.

Out of this inevitable friction there emerged a serious question the solution of which, among other things, was left to the arbitrament of war. This was the irritating question of Chinese jurisdiction over foreigners in general and the European traders in particular. Resistance by the latter to Chinese authority had incurred the rigid application by China of the right of territorial jurisdiction. China had for centuries before insisted upon and exercised complete jurisdiction over all foreigners within her domain. And the tenacity with which she clung to this right, even in the face of attempted usurpations, up to the signing of the Treaty of Nanking in

[21] Portugal was then temporarily united with Spain under Philip II (1580-1640), and the Netherlands was waging a war of independence against Spanish political domination. But it cannot be admitted that the Dutch had the right to attack Macao because it was a Portuguese settlement located on Chinese soil.

[22] Wang and Hsu, History of the Manchu Dynasty (in Chinese), Vol. I, p. 96; Inaba, *op. cit.*, p. 62.

[23] Davis, *op. cit.*, p. 34; Sargent, Anglo-Chinese Commerce and Diplomacy, p. 4.

[24] The Manchus, one of the two and the last of alien rulers of China, were also actuated by the fear that the Europeans might aid the conquered Chinese natives to thwart their newly established dominion over China.

1842 only proved her honest desire to maintain her territorial sovereignty intact.[25]

In enforcing her jurisdiction China antagonized all foreign interests, especially those of innocent traders. Upon the ground that the spirit and letter of Chinese laws were unduly harsh [26] and the trade regulations oppressive, coupled with the venality of some Chinese officials who made life intolerable, foreigners in general were bent on defeating the purposes of the Chinese authorities. Complaints were most numerous in regard to the exercise of jurisdiction. Foreigners submitted to it only when the native officials resorted to the interdiction of trade. This was a most efficacious weapon in compelling obedience. But each and every time trade was stopped in order to induce an accused foreigner to be surrendered for trial by the Chinese authorities, the innocent traders of the nationality of the accused were made to suffer for what they were not responsible. And the greater the resistance against the exercise of Chinese jurisdiction, the greater, correspondingly, was the vigor and rigidity applied to the laws administered in regard to those who violated them. It became, therefore, not a surprising development when Western nations, led by the English, took full advantage of the first opportunity that offered to rescue their nationals from what was alleged to be an oppressive situation.

The defeat of China by England (1840–42) paved the way for the application of relief. China was compelled, among other things, to grant exemption from her territorial jurisdiction to all British subjects found within her dominion. Other Western states followed with demands for similar concessions and with equal success.

It was under these circumstances that the jurisdictional right over foreigners was lost to China. Insisting to the very last upon the exercise of this sovereign right, she accepted what was the best bargain of an inevitable settlement. However, this solution was greeted with some satisfaction by certain native officials because it eliminated, for the time being, a most annoying problem confronting the local provincial authorities charged with the conduct and responsibilities of the foreign relations of the country. As the number of foreign residents was comparatively insignificant, and confined to the few treaty ports, Chinese officialdom viewed the concession as an advantageous expedient.[27]

[25] See Morse, *op. cit.*, Ch. V; also Koo, *op. cit.*, p. 65.

[26] Referring to the complaints of Europeans and Americans against the severity of the former Chinese penal code and the injustice of the Chinese courts, Professor E. T. Williams says: "There was much ground for these complaints, but, in the beginning of Western intercourse with China, Chinese codes were less severe than those of Europe. Many complaints were due to an ignorance of the Chinese language and of the Chinese law." Article on "China at the Washington Conference" in the University of California Chronicle, Vol. XXIV, p. 177.

[27] Jernigan calls attention to the fact that at the time "China wanted as little intercourse as possible with foreigners, and seeing that it was very difficult to keep them out of her territory, she was willing to let them manage their own household affairs, as best suited themselves when they took up their abode therein." China in Law and Commerce, p. 194.

As soon as China found the system of extraterritoriality disagreeable, it was only a matter of time when demand would be made upon the treaty states for its abolition. In recent years the cry raised against it has become incessant, notwithstanding that China is not as yet in a position to assume the task and responsibilities involved in the administration of justice to foreign residents. Nevertheless, China's protests have evoked proposals aiming at the abolition of the objectionable régime. These various proposals will be analyzed, prefaced with a brief review of the few basic principles upon which the régime of extraterritorial jurisdiction is constructed, the nature of the protection provided, and its practical operation.

Extraterritorial jurisdiction in China is a right exercised solely by virtue of an express grant which is embodied in a treaty or treaties between China and Western states.[28] By granting extraterritorial rights to foreigners, China divested herself of the authority to control them judicially. Chinese courts can no more try and punish an accused individual of such a privileged class, who may be a defendant in a civil suit or who has violated a local law,[29] than they can function outside of China without sanctions of any kind. It is not their persons only, but also the property of such foreigners, which cannot be reached by the processes of Chinese courts.[30] Notwithstanding that they actually live in China, enjoying the privileges of residence, the hospitality, and the protection of the Chinese Government,[31] these foreigners are practically governed by their own national laws administered by officials of their home state.

The immunity thus conferred upon foreigners seems, indeed, extensive. However, it is not as sweeping and formidable as it may appear. For its extent, like the right itself, is defined by the treaties. Moreover, by reason of the fact that extraterritoriality is an international servitude, the treaty provisions upon which the resultant jurisdiction is based are strictly construed.[32] Further, the inherent and practical defects of extraterritorial

[28] Piggott, Exterritoriality, p. 18.

[29] Arrest may, however, be effected by the native Chinese authorities in the event of such foreigner or foreigners being caught in the commission of a crime. But, even in this case, the offenders must be turned over immediately to the nearest consul of their nationality for trial and punishment. Moreover, while under arrest, they must not be subjected to any ill-usage in excess of necessary restraint at the hands of the native officials making the arrest and conveying them to their nearest consulate.

[30] Even native servants and employees of the privileged foreigners, who generally live within the foreign settlements in the treaty ports, cannot be arrested without the consent of the senior consul of the settlement or consul of their foreign employer.

[31] China is required by the treaties to place foreigners on a common footing of amity and good-will with her own subjects, and agrees that they "shall receive and enjoy, for themselves and everything appertaining to them, the protection of the local authorities of government, who shall defend them from all insult and injury of any sort."

[32] Hall, International Law (7th ed.), p. 167; Hall, Foreign Jurisdiction of the British Crown, p. 135; Moore, International Law Digest, Vol. II, p. 18. However, the policy of the treaty states towards China respecting the interpretation of treaty provisions has always been, and still is, one of very liberal construction.

jurisdiction may so circumscribe the scope of the immunity that they, too, constitute additional restrictions.

While foreigners who have incurred the law's displeasure are exempt from the judicial intervention of the Chinese authorities, they are by no means released from the obligation of obeying the native laws. "There is nothing to prevent the application . . . of the ordinary principle," writes Piggott, "that a foreigner owes temporary allegiance to the law of that country. The fact that his offences are decreed to be judged, and his disputes are allowed to be settled, by the law of his own country, does not remove him from the sphere of his temporary allegiance and obedience."[33] What has been yielded in the treaties is, therefore, merely the treaty right that foreign offenders shall be punished by their own national authorities and in accordance with their own national laws. And this in no way means that they are at liberty to break or violate the native laws.[34]

Once the treaty right to exercise jurisdiction over its own nationals within another state is acquired, the treaty state is obligated, in the nature of the case, to provide the appropriate and necessary agencies and machinery for its administration. The kind of machinery provided may vary; but the proper administration of justice demands that suitable agencies and a qualified personnel should be installed. The fact that extraterritorial rights are acquired for the sole purpose of mitigating, rather than aggravating, existing injustice, alleged or real, in a country deficient in modern methods of dispensing justice, should always guide and control any determination in the selection and institution of appropriate and adequate instrumentalities.

Owing to the proportionately greater expense, the seeming lack of interest on the part of the governments of the treaty states, and the comparatively small number of cases that comes up for adjudication, no separate establishments were provided in the beginning by the treaty states. They invariably utilized their consular and diplomatic services for the purpose, with the bulk of the work falling on the former. Therefore, in addition to his commercial functions, the consul of a treaty state performs the numerous rôles not only of a judge sitting over civil and criminal actions instituted against his fellow-nationals, of a coroner, registrar, probate judge, and police magistrate, but also that of an advocate in the court of the native defendant on behalf of his aggrieved fellow-national.

The questionable results attained in a system of administering justice by

[33] Exterritoriality, p. 21.

[34] "For example, if Chinese law prohibits Chinese from going through a certain passage, foreigners cannot claim to go through that forbidden passage in virtue of extraterritoriality. If they go through it, they thereby break a Chinese law; their own national officials are to punish them in accordance with such laws as provide for analogous cases in their country." Portion of the circular of March, 1878, sent by the Chinese Foreign Office to Chinese Ministers abroad relating to the subject of extraterritorial jurisdiction as interpreted by China. U. S. Foreign Relations (1880), p. 177; Hart, These from the Land of Sinim, Appendix I, pp. 176–7.

consular officers, who, for the most part, are untrained in the law, are obvious. Remedies have been applied, however, as the glaring defects were from time to time brought to light. Two or three treaty states have introduced legal talent into their consular service to take over the judicial duties from overburdened consular officers. Great Britain has advanced a step further by establishing, in 1904, "His Britannic Majesty's Supreme Court for China" to supplement the consular courts. The United States likewise in 1906 created "the United States District Court for China." Through these corrective efforts some relief has been provided in bringing about a more dignified and technically correct mode of administering justice in China. However, there still remains much to be desired in the improvement of the machinery. Because of the defects inherent in the system itself, combined with the practical difficulties in administration, it is doubtful whether these extraterritorial courts, even though they constitute an improvement, will ever approach the standards maintained by the judicial organs in the countries of the West. But here is an interesting fact to be noted: despite the objections against the present system of extraterritoriality as a whole, most foreigners in China prefer and uphold it, rather than submit to the jurisdiction of the Chinese courts as they are now constituted.[35]

In accordance with the rule of suing in the court of the defendant, China has in use what may be called "mixed" tribunals for the trial of Chinese offenders[36] upon complaint of aggrieved foreigners. These are territorial courts,[37] presided over by Chinese magistrates who possess, at least in theory, complete jurisdiction over all persons within their respective districts, natives as well as foreigners not exempted by treaty. Here Chinese laws are enforced.

These tribunals of justice, the consular and "mixed" courts, are, in the main, courts of first instance.[38] Appeals from their decisions are, there-

[35] It appears that foreigners in China insist upon the retention of their extraterritorial rights for two principal reasons: (1) Because the Chinese judiciary is far from having reached that stage of development in the administration of the law as to gain their complete trust and confidence; and (2) because of the natural reluctance to forego the customary protection of their own national officers and governmental agencies in China.

[36] Nationals of non-treaty states also come under the jurisdiction of these "mixed" tribunals.

[37] It has been contended, though not seriously, that these are not strictly Chinese courts on the ground that the Chinese phrase "hui t'ung," as contained in the Chefoo Convention of 1876 referring to "mixed" cases, meant combined or joint action in judicial proceedings which, correctly interpreted, confers equal authority or voice upon the foreign officer sitting with the Chinese magistrate in rendering decisions; hence the equality of power deprive these courts of its Chinese character. North China Herald, Jan. 24, 1906, p. 168.

[38] The International Mixed Court at Shanghai is an exception to the rule. It is both a court of first instance and an appellate court. And since it came under the control of the consular body of the International Settlement in 1911, it even has usurped the status of a court of last resort in criminal matters. Chinese offenders are given a rehearing, when there can be shown justification, by the same court which had found them guilty in the first instance.

fore, usually allowed as provided by law. But each treaty state has its own system of appeals. And if any appeal has to come before the highest tribunal in the country of the treaty state, it is removed there irrespective of distance and expense.

Appeals from the "mixed" courts are generally heard by the Prefect of the district sitting with (hui t'ung) the consul-general or consul of the foreign plaintiff.[39] Should the matter be further contested, the appeal then goes for final settlement between the Chinese Foreign Office and the chief diplomatic officer of the plaintiff's nationality.

This, in brief, constitutes the judicial machinery or agencies provided both by the treaty states and China under the régime of extraterritoriality in China. It is not a groundless criticism to point out that these are inadequate, cumbersome and defective. The only good purpose the system has well served is the original purpose of the treaty states in establishing extraterritoriality, that of withdrawing their own nationals in China from Chinese territorial jurisdiction and affording them the benefit of their own national laws.

The usefulness or convenience of extraterritoriality to foreigners residing in China does not, however, forever justify its continued existence. If the grounds upon which it came into being have been materially altered, a reconsideration of the equity of the system should be undertaken with a view of modifying it. As a makeshift,[40] the undue prolongation of its life beyond the point of necessity would only tend to create a national grievance in the state that granted the privilege to foreigners.

Prompted by such reasons, China has launched protests against the extraterritorial régime and has requested an early readjustment on a mutually acceptable basis.[41] Because of their important bearing on any discussion of schemes proposed in substitution for the present arrangement, it may be profitable, even at the risk of monotonous repetition, to reproduce briefly the substance of the Chinese contentions.[42]

Of the numerous outstanding defects of extraterritoriality in China, the diversity, uncertainty and inadequacy of the laws applied by the consular courts of the various treaty states constitute the first important indictment against the system. In practice these elements operate, singly or together, to produce different decisions in the consular courts of each treaty state when the circumstances and facts are exactly identical; in other words, what makes an act an offence or cause of action in a consular court of one

[39] This procedure does not apply to the International Mixed Court and the Mixed Court in the French Concession at Shanghai.

[40] "Extraterritoriality is at best an unsatisfactory makeshift. It involves a multiplicity of courts, confusion of laws, and calls forth national prejudices." G. Ohlinger, "Extraterritorial Jurisdiction in China," 4 Michigan Law Review, 348.

[41] The first official Chinese protest was presented to the Powers by China at the Paris Peace Conference in 1919.

[42] The Shantung Question, etc., *op. cit.*, pp. 163–5.

nationality may not be so treated in a court of another nationality.[43] Consequently, they give rise to a most unjust inequality of treatment to defendants and at the same time deprive the plaintiffs of the justice which is their due.

Secondly, the consular courts are empowered to take cognizance only of the acts of their own nationals. In short, their jurisdiction is personal. This defect conduces to the compromising of justice, because the court has no power to compel a witness of another nationality to testify. Nor has the court power to inflict punishment, either by fine or imprisonment, for perjury committed by a person of another nationality. Neither has it power to entertain a counter-claim filed by the defendant (of its own nationality) against the plaintiff of another nationality in the dispute before it.

Thirdly, China finds extraterritoriality seriously deficient in the event of a foreigner committing a crime in the remote interior. The treaties stipulate that such a person "shall be handed over to the nearest consul (of his nationality) for punishment." But if the latter is stationed, as he generally is, at a great distance from the scene of the crime, the accused is practically assured of his liberty because the personal appearance at court of native witnesses is made most difficult, if not impossible, owing to the poor communications, and the time and expense required to make the trip. Insufficiency of evidence has too frequently resulted in the denial of justice.

Fourthly, the exercise by consuls of judicial functions is not conducive to the impartial administration of the law. They are unfitted for the task for three principal reasons: (1) Their first duty is to protect the interests and persons of their nationals; (2) they are generally men not trained in the law; and (3) their national bias often creeps unconsciously into their action and decisions.[44]

Fifthly, "There is a multiplicity of courts in one and the same locality, and the interrelation of such courts has given rise to a legal situation perplexing both to the trained lawyer and to the layman." [45] This arrange-

[43] Italians participating in the illicit trade in opium, for example, until October, 1921, absolutely escaped from punishment by their own consular courts, because no Italian law penalizing such trading had been passed by the Italian Government previous to that date. Before the law was passed the worst that could have happened to an Italian detected while trading in opium would have been the confiscation of the commodity by the Chinese Maritime Customs.

[44] This evil is fully felt in the "mixed" courts because, contrary to general belief, the foreign assessor, who is usually a junior in his consular service, actually participates in the decision, though not formally. By the treaties he is allowed to attend and watch the proceedings where his nationals are plaintiffs in the interest of justice and to protest against any irregularities; but he has arrogated to himself the power of dictating the judgment. He is there to protect the interests of his nationals, and the Chinese magistrate is fully aware of it. Consequently, the proceedings too often develop into a mere wrangle between the two. Ohlinger, *op. cit.*, pp. 345–6; Latter, The Government of Foreigners in China, 19 Law Quarterly Review, 321.

[45] Senate Doc., *op. cit.*, p. 475; North China Herald, April 27, 1906, p. 211.

ment, in practice, produces delay, if not ultimately a miscarriage of justice; for the complainant who has been injured in his rights or person by nationals of several treaty states, and who is, therefore, obliged to bring separate suits in each of the many consular courts, will have to contend with as many sets of foreign laws as there are defendants in the case. And since the several suits pending before the consular courts are decided under different systems of law, the uncertainty of the justice due him is very great, and the results, after all, may be prejudicial to his interests.

And lastly, though not the least important, foreigners in China claim, under cover of extraterritoriality, immunity from local taxes and excises which the natives are required to pay regularly to the governmental exchequer.[46]

These objections comprise, in the main, the Chinese indictments against the further maintenance of the system of extraterritorial jurisdiction in China.

There is no doubt that China is sincere in her efforts toward rehabilitating her national judicial system. The most important treaty states have shown an equal sincerity in assisting her by recognizing officially, at the Washington Conference, the principle of relinquishing their extraterritorial rights. Yet the delicate and complicated problem is far from being considered solved. The abolition of extraterritroiality in China must needs evolve an equitable and practical substitute for the present régime and take into consideration the period of time required by China completely to regain her judicial sovereignty.

Inasmuch as the ultimate relinquishment of extraterritorial rights by the treaty states depends, after all, upon the actual state of the Chinese laws and their administration, it may be pardonable to restate what China has achieved in legal and judicial reforms. According to Dr. Wang Chunghui:

> A law codification mission for the compilation and revision of laws has been sitting since 1904. Five codes have been prepared, some of which have already been put into force: (a) The Civil Code, still in the course of revision; (b) the Criminal Code, in force since 1912; (c) the Code of Civil Procedure, and (d) the Code of Criminal Procedure, both of which have . . . been promulgated; and (e) the Commercial Code, part of which had been put into force.
>
> These codes have been prepared with the assistance of foreign experts, and are based on principles of modern jurisprudence. Among the numerous supplementary laws special mention might be made of a law, called "Rules for the Application of Foreign Laws," which dealt with matters relating to private international law. Under these rules, foreign law is given ample application. Then there is a new system of law courts established since 1910. The judges are all modern, trained lawyers, and no one could be appointed a judge unless he had attained the requisite legal training. These are some of the reforms which had been carried out in China.[47]

[46] Senate Doc., *op. cit.*, p. 476.
[47] Senate Doc., *op. cit.*, p. 476.

China herself was first to present a plan. At the Paris Peace Conference, in 1919, she requested that the régime of extraterritoriality disappear at the expiration of a definite period and upon the fulfillment of the following conditions:

> (1) The promulgation of a Criminal, a Civil, and a Commercial Code, a Code of Civil Procedure and a Code of Criminal Procedure.
> (2) The establishment of new courts in all the districts which once formed the chief districts of the old prefectural divisions, that is to say, in fact, in all the localities where foreigners reside.[48]

And she undertakes "that by the end of 1924 the above-mentioned conditions shall be fulfilled."[49]

"On the other hand, she requests the treaty states to give their promise that upon the fulfillment of the conditions they will at once relinquish their consular jurisdiction and the jurisdiction of their special courts (if they have any) in China." And before the actual abolition of the system now in vogue, she requests the Powers immediately to agree:

> (a) That every mixed case, civil or criminal, where the defendant or accused is a Chinese, be tried and adjudicated by Chinese courts without the presence or interference of any consular or representative in the procedure or judgment.[50]
> (b) That the warrants issued or judgments delivered by Chinese courts may be executed within the concessions or within the precincts of any building belonging to a foreigner, without preliminary examination by any consular or foreign judicial officer.[51]

Complementary to the above Chinese official proposal, Professor W. W. Willoughby, sometime Legal Adviser to the Chinese Government, makes the following suggestions:

> . . . The most promising mode by which the Chinese could be aided in bringing about a situation under which it would be expedient to abolish extraterritoriality would be for the Powers to permit the Chinese, as a first step, to establish courts for the trial of cases in which foreigners are parties either as defendants or plaintiffs, that would be truly "mixed" in character; that is, tribunals presided over by two or more judges of whom one at least should be a foreigner learned in the law and experienced in administration. These courts would be Chinese courts, and the judges Chinese officials, the judges who are foreigners, however, to be appointed upon the nomination of, or at least with the approval of, the foreign offices of the Treaty Powers. In those cases in which the judgments rendered are not approved by the foreign judge, a right of appeal should lie to a superior and the cases

[48] Willoughby, Foreign Rights and Interests in China, p. 78.

[49] The Shantung Question, etc., *op. cit.*, p. 165.

[50] The abuse of the assessor system by consular officials has done more than any other factor in humiliating Chinese national pride and in convincing the Chinese of the foreigners' selfish aggression in the name of justice.

[51] The Shantung Question, etc., *op. cit.*, pp. 165–6.

heard before a panel of judges of whom a majority should be of foreign nationality. If it should be found that the Chinese authorities and the Chinese judges were disposed to give whole-hearted coöperation in this scheme, and satisfactory results were obtained, the participation of the foreign judges might be gradually lessened, until the Chinese judicial system would become fully freed from all extraterritorial elements.[52]

Dr. M. T. Tyau, a Chinese authority, proposes the abolition of extraterritoriality in three stages: the first stage to be spent in the reorganization or institution of "mixed" tribunals with the cooperation and assistance of the treaty states; the second stage to involve the abolition of the consular courts; and the final stage to restore to China complete jurisdiction over foreign residents in China. In elaboration of his proposal he says:

In justice to the Chinese, the Treaty Powers who have already signified their willingness to assist them in their judicial reforms should, in the first place, do more than utter the mere promise to assist. As a policy of expediency, as well as of statesmanship, a new agreement may be entered into for this precise object, and assuredly the multitudinous interests involved are sufficiently important to warrant the conclusion of a special convention. On the other hand, the Chinese should welcome the participation of foreign lawyers in the administration of their new courts, especially in those which try cases between foreigners and Chinese. Since it will take five years, at least, to complete the codification of civil and commercial laws, such a treaty might provide that the Powers will surrender a portion of their extraterritorial rights upon the promulgation of all the new codes. These codes will require experimenting with for a few years; therefore, the Powers may promise to relinquish a further portion of their extraterritorial privileges, say, five years from the date of promulgation of the latest code. At the end of ten years of cooperation between the two sides it is conceivable that no mean progress will have already been made; wherefore, the relinquishment of the final trace of extraterritorial rights might be arranged to take place as soon as China can show that she is reasonably able to accord both protection and justice to foreigners in her territory, this period to be probationary, say from two to five years, depending upon the success of China's cumulative efforts.

. . . With the gradual abolition of extraterritoriality, the convention should also provide for the reorganization of existing, or the institution of new, mixed tribunals, as part and parcel of the scheme of judicial reform. A start in this direction may be agreed to be made in large treaty ports, that is, in cities which already possess a mixed population of Chinese and foreigners, where the effect of foreign participation will be at once felt, and where the proposed reform will have perhaps the best baptism of probation.

In regard to the element of foreign participation it does not appear to be wise to stipulate beforehand how the foreign judges should be nominated, but their appointment should be left entirely to the Chinese. On the other hand, the Chinese Government should offer to employ the best foreigners available for the purpose, whether in or out of China, and irrespective of nationality. To ensure that such foreign participa-

[52] Willoughby, *op cit.*, pp. 79–80.

> tion is not mere make-believe, the Chinese will be well advised to engage foreign lawyers not only as judges, but also as procurators, and their powers should not be merely advisory or consultative. In this way the necessary confidence will be inspired among all parties.[53]

An analysis of the aforementioned schemes discloses certain practical difficulties: In the first place, the official Chinese proposal places excessive confidence in the remedial efficacy of new legal codes and in the mere establishment of new Chinese courts. Although humane and scientific codes, and properly organized tribunals, are indispensable instruments, and are generally given first consideration in the institution of a modern judicial system, they do not constitute convincing proof or a guarantee that all judicial shortcomings and abuses of the past will automatically disappear. What China most urgently needs are competent administrators of the law. The ridiculous treatment meted out to Russian subjects in Manchuria, particularly in Harbin, after the suspension of their extraterritorial rights by the Chinese Government in September, 1920, leads one to question China's readiness to enforce her laws justly without qualified judges.[54] The immediate rectification of this deficiency is most pressing[55] in view of the fact that thousands of Russians, Germans and former subjects of the defunct state of Austria-Hungary, living in China, are now under Chinese jurisdiction.

Both Professor Willoughby and Dr. Tyau recognized the primary and immediate need of a rehabilitated Chinese judicial system. It is the efficient administration of the law that has the greatest bearing upon the abolition of extraterritoriality. And that cannot be better initiated than by the appointment by China of foreigners "learned in the law and experienced in administration" as judges and procurators. If China is really anxious to put an end to the present system of judicial incumbrances, this sort of foreign participation is undeniably essential. There is no implication, however, that native Chinese talents alone are not capable of bringing about the desired change. But such an arrangement, if followed, may mean slow and uncertain development in the administration of the law and, therefore, retard the early realization of China's ardent wish. Under a plan of foreign guidance and tutelage the native judges will benefit from the training and experience of their foreign colleagues. It will also have the tendency to induce the treaty states to accede to China's wishes when once they feel that their interests are adequately protected.

However, foreign participation in the form suggested by Professor Willoughby raises at once a delicate question. Shall China have a free hand in

[53] "Extraterritoriality in China and the Question of its Abolition," The British Year Book of International Law, 1921–22, pp. 143–5.

[54] See articles by Rodney Gilbert on "Russians under Chinese Jurisdiction" in the North China Herald of April 16 and 23, 1921.

[55] Many Chinese lawyers, graduates of law colleges in the West, are practicing before the foreign and mixed courts at Shanghai in preparation for service in the new Chinese courts.

the choice of foreigners as Chinese judges and procurators? It is only reasonable that China should exercise the right of appointment. The restriction that the appointment of judges shall be by "the nomination of, or at least with the approval of, the foreign offices of the Treaty Powers" [56] seems, however, unwise; for the distribution of Chinese judgeships among the qualified foreigners of the various nationalities, in view of past experience, may involve China in a struggle for national advantages by the treaty states among themselves to the detriment of judicial reforms. There is also the possibility that extraneous issues may be injected by the latter. China should be given full discretion in the matter, the treaty states relying upon her to appoint, as she has done in the selection of foreign legal experts for the preparation of her codes, qualified foreigners available for the Chinese bench.

In regard to the establishment of truly "mixed" tribunals for the trial of cases in which foreigners are parties either as defendants or plaintiffs, that is *prima facie* necessary and urgent. The system of "mixed" courts has not received the attention which it deserves. But in view of the fact that there are already in existence three grades of new courts in most of the Chinese provinces, there is little justification in establishing a separate system for "mixed" cases. The District Courts, as courts of first instance for native cases, should be utilized for the trial also of "mixes" cases, but with at least one foreign Chinese judge sitting with his native Chinese colleagues. Then, as Professor Willoughby further suggested, "in those cases in which the judgments rendered are not approved by the foreign judge, a right of appeal should lie to a superior court and the cases heard before a panel of judges of whom a majority should be of foreign nationality." Again, there is no good reason why the high court of the province should not constitute such a court. And further appeal, if necessary, should be allowed to be carried to the highest tribunal in the land, the Taliyuan or Supreme Court.[57] In brief, the system of "mixed" courts should form an integral part of China's national judicial organization. Under this arrangement foreigners would have the full benefit of Chinese law.

As to what constitutes a reasonable time in which China may hope to recover her judicial sovereignty, the immediate answer is that it will depend largely on herself. It has been advocated that a definite period be set and agreed upon, but there is no practicable basis upon which this can be determined. It is entirely problematical as to when the native Chinese judges will command confidence and respect, especially in view of the transitory changes now taking place and likely to continue in China for some years to come. The problem of setting a definite time limit is quite different from

[56] Willoughby, *op. cit.*, p. 80.

[57] As a court of last resort for "mixed" cases it is uncertain whether the appeals should be heard before a bench composed of both foreign and native Chinese judges. As an experiment, however, it seems desirable to allow the latter to adjudicate them, with the former acting as legal advisers on points of procedure.

that of adopting a complete set of legal codes and instituting new judicial machinery. Hence it is impossible, even though desirable, to come to any just conclusion as to how soon and when China should be free from the present extraterritorial régime.[58]

China, too, is not blind to the difficulties of arriving at an equitable determination of this question. In phrasing her latest request for the withdrawal of extraterritorial jurisdiction at the Washington Conference, China asked that it be carried out "as soon as circumstances would permit," and invited the Powers "to coöperate with her in taking initial steps toward improving and eventually abolishing the existing system."

Under existing conditions, and in the light of past practices, it is desirable that the mutual rights and obligations assumed by China and the treaty states in any plan for the gradual abolition of extraterritoriality should be clearly stated in a treaty or convention. Such an international agreement would give further encouragement to the Chinese reforms, and the promises of the treaty states would not become meaningless words, but definite undertakings of future action.

There is, however, a serious obstacle in the way of making such an international agreement an instrument of practical value. Unanimity would be required to put it into force, and there are today at least fourteen states holding extraterritorial rights in China. Will China succeed in obtaining the unanimous consent of the treaty states to the document without some sort of *quid pro quo?*[59]

In lieu of unanimity of agreement to make the instrument operative a substitute expedient of partial consent would seem to be necessary. The approval of the major treaty states, such as the United States, France, Great Britain and Japan should suffice to give it immediate effect. By reason of their larger interests in China, they must of necessity be accorded exceptional treatment. The proposed arrangement does not in any way imply the exclusion of the lesser treaty states from effective voice in the adoption of the agreement. The purpose is that, if for reasons of their own making the lesser states refuse or unnecessarily delay the operation of the agreement, they should not be allowed to defeat its purpose.

To sum up, it would seem that the following principles should govern the disposition of the abolition of extraterritorial jurisdiction in China: (1) the adoption by China of the necessary legal codes, to wit, a civil, a criminal, and a commercial code, a code of civil procedure and a code of criminal procedure; (2) the reorganization of the existing Chinese courts, particularly in localities

[58] The shortness of time in which China fulfilled her part of the Sino-British Opium Suppression Agreement of 1908 has been used as a favorite argument in favor of setting similarly a definite date for the abolition of extraterritoriality. However, opium suppression does not involve a constructive program and the task is quite different in nature.

[59] Sweden agreed in 1908 that she will be prepared to relinquish her extraterritorial rights as soon as all other treaty states have agreed to do the same.

where there are treaty ports; (3) the establishment of "mixed" courts as an integral part of the regular judicial system, conferring upon foreigners the full benefit of Chinese laws; (4) the appointment as Chinese judges and procurators of foreigners learned in the law and experienced in administration irrespective of nationality, and at the unfettered discretion of the Chinese Government; (5) the provision for gradual and progressive relinquishment of extraterritorial rights by the treaty states corresponding to the ascertained fitness of the Chinese judiciary to exercise jurisdiction over foreigners; and (6) the conclusion of an international agreement embodying the solemn promise of the treaty states to surrender their extraterritorial rights immediately upon the fulfillment by the Chinese judiciary of certain elemental and progressive tests of judicial proficiency, the agreement to come into force upon ratification of the major treaty states on the one hand, and China on the other.[60]

Guided by these principles, and with the sympathetic and active coöperation of the treaty states, China should encounter no serious impediments in the recovery of her jurisdictional rights. It is much to be regretted, however that she is still passing through a state of political unsteadiness. With the country under the control of irresponsible militarists, who owe but nominal obedience to an impotent central government, China cannot be said to be in an encouraging condition for judicial experiments contemplated in any scheme to do away with extraterritoriality. Supremacy of the law must, above all, be upheld and respected. While constructive judicial reforms are urgent in order that the abolition of extraterritoriality may be hastened, it is equally, if not more, pressing and indispensable that the authority of the central government shall first be reestablished throughout the land.

[60] See editorial comment by Mr. C. C. Hyde in this JOURNAL, Vol. XVI, No. 1, pp. 70–4, for an interesting discussion of the protection of foreign interests involved in the restoration to China of her jurisdictional sovereignty.

THE SETTLEMENT OF LAUSANNE

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On August 6, 1924, nearly six years after the Armistice of Mudros, the state of war which had existed in the Near East since 1914 was terminated as between Turkey, on the one hand, and the British Empire, Italy and Japan, on the other hand, by the drawing up of the first *procès-verbal* of the deposit at Paris of the ratifications of the settlement concluded at Lausanne on July 24, 1923. The state of war between Greece and Turkey had already been terminated a year ago, pursuant to the settlement of Lausanne, and under the terms of the same settlement the Allied forces of occupation had been withdrawn from Turkish territory; the prisoners of war and interned civilians detained by Greece and Turkey, respectively, had been mutually restored; the compulsory exchange of certain portions of the Greek and Turkish populations had been effected; and a general amnesty for political offenders had been declared. The portions of the settlement brought into force by the recent ratifications are the Treaty of Peace, the Straits Convention, the Commercial Convention and the Convention respecting Jurisdiction and the Conditions of Residence and Business. Certain instruments which did not require ratification, including the Declarations relating to Sanitary Matters and to the Administration of Justice and the Protocol and Declaration relating to Concessions, may now also be expected to be given practical effect.[1]

The settlement between the Allied Powers and Turkey differs from the other settlements following the World War chiefly in the fact that, in addition to disposing of the questions normally incident to the restoration of peace between belligerent nations, it was necessary at Lausanne to draw up and incorporate in numerous instruments detailed provisions for the substitution of the régime of generally recognized international law for the capitulatory régime which has prevailed in Turkey for some hundreds of years. Other provisions which impart to the settlement its peculiar character and significance are those which relate to the safeguarding of the minorities, the disposition of pre-war concessions, the regulation of the navigation and passage of the Straits, and the reparation of war damages.

THE CAPITULATIONS

The judicial and fiscal privileges granted to foreigners by the first Sultans at Constantinople were doubtless regarded by their grantors as voluntary

[1] The documents embodying the settlement of Lausanne were printed in the Supplements of the Journal for January and April, 1924.

and spontaneous concessions which could be withdrawn at the imperial pleasure. The Sultan's unilateral denunciation of the capitulations, in 1914, in so far as his action was not based on purely practical considerations, appears to have been made upon the theory that those early concessions, though later embodied in treaties and confirmed by long usage, were still essentially of a revocable character. This theory was of course instantly repudiated by all the Capitulatory Powers—including even Germany and Austria-Hungary, with whom Turkey was shortly to be allied. It was again advanced by the Turkish representatives at Lausanne, but it was reinforced there by arguments which showed some disposition to meet the Capitulatory Powers on their own ground.

Admitting for the purposes of the argument that the capitulations were bilateral agreements—synallagmatic, as they have been called, the Turkish representatives at Lausanne contended that Turkey had nevertheless the right to terminate the capitulations unilaterally, as being prejudicial to her political and economic existence, inconsistent with altered conditions in the country, and incompatible with generally recognized international law.

The Allied representatives at Lausanne were convinced of the necessity and the propriety of a revision of the capitulations with a view to obviating prejudice to the political and economic welfare of Turkey and adapting them to conditions in the country, in so far as those conditions had been altered in material respects since the capitulatory régime was instituted. They were not at all troubled, however, by the fact that the capitulations were incompatible with generally recognized international law. The régime of the capitulations was generally regarded by them as constituting a necessary exception to the rule of exclusive territorial jurisdiction prevailing in countries whose laws and administrations were modeled upon Western ideas. The only questions which they believed to be arguable were the nature and extent of the capitulatory provisions which it would be necessary to continue in force, at least for a transitional period.

Every one knows how the argument ended. The Turks adhered to the declaration in their National Pact of January 28, 1920, opposing restrictions inimical to the national development in political, judicial, financial and other matters,[2] and the exceptions to the régime of generally recognized international law were reduced to a minimum. It is worth noting that the formula finally agreed upon regarding the termination of the capitulations[3] is consistent both with the view of the Turks that the capitulatory system was legally terminated in 1914 and with the view of the Allies that it continued to be binding in law until the coming into force of the Treaty of Peace.

[2] See the English translation of the National Pact from the Turkish text in Toynbee, The Western Question in Greece and Turkey, pp. 209–210.

[3] In Article 28 of the Treaty of Peace "the High Contracting Parties declare that they accept, each in so far as it is concerned, the complete abolition of the Capitulations in Turkey from every point of view."

The system which now replaces that of the capitulations in Turkey is, in the words of the preamble of the Treaty of Peace, "based on respect for the independence and sovereignty of States." The Convention respecting Jurisdiction and the Conditions of Residence and Business provides that in Turkey, upon condition of complete reciprocity, the nationals of the other contracting parties shall be received and treated, as regards their persons and their property, in accordance with ordinary international law. The remainder of the convention is hardly more than an amplification of this provision, except that, still subject to reciprocity, Allied nationals in Turkey are accorded equality with Turkish nationals as regards taxes and other fiscal matters, and that, without the condition of reciprocity, the non-Moslem nationals of the Allied Powers in Turkey are accorded the right to apply to courts in their own countries for the adjudication of matters involving their personal status or domestic relations or the succession to and the distribution and liquidation of personal property.

The explanation of the exception just noted as regards jurisdiction is not far to seek. Questions involving the personal status and domestic relations of Moslems have always been decided in accordance with the Mohammedan Sacred Law, just as similar questions affecting the Christian subjects of Turkey have been decided by the ecclesiastical authorities of the Christian communities in accordance with the laws and customs of those communities. The Turks, recognizing the peculiarity of the Western system of law under which such questions are referred to the civil courts, had no difficulty in agreeing to the proposal that foreigners be permitted to carry such questions to the courts of their own countries. The Turkish opposition to allowing jurisdiction in matters of personal status and domestic relations to the foreign consuls in Turkey was presumably due to an apprehension that judicial powers once conceded might be inordinately extended.

In regard to judicial matters other than those above indicated, Allied nationals in Turkey are to be amenable to the Turkish tribunals, through which, according to the Declaration of the Turkish delegation regarding the Administration of Justice, the Government of the Grand National Assembly (now the Republic of Turkey) is in a position to assure to foreigners "all the safeguards of a good judicial system." Foreign opinion may be less inclined to agree with this statement than to approve that which follows, to the effect that the Turkish Government is "prepared to have an investigation made and to cause the situation to be studied with a view to the institution of such reforms as may be rendered advisable by the development of manners and civilization." Apprehensions on this score may, at any rate, be allayed to some extent by the announced intention of the Turkish Government to take immediately into its service for not less than five years a number of European legal advisers whose duties will be to participate in the work of legislative commissions; to observe and report to the Minister of Justice on the functioning of the Turkish civil, commercial and criminal

courts; and to receive complaints growing out of the administration of justice, the execution of sentences, or the application of the laws, and out of domiciliary visits, searches, and arrests. It should be noted in this relation that, as the sittings of the Turkish courts are usually open to the public, there will apparently be nothing to prevent the attendance of consuls at judicial proceedings which concern their nationals. Further reassurance may be conveyed by the declaration of the Turkish delegation that in cases of minor offenses release on bail shall always be ordered unless it entails danger to the public safety or impedes the investigation of the cases. Finally, there appear to be great possibilities in the undertaking that all arbitral decisions in civil or commercial matters shall be executed upon being signed by the president of a court of first instance, "who shall not refuse his signature unless the decision should be contrary to public order."

Two phases of the capitulations which remain to be mentioned relate to the customs régime and the sanitary administration. As regards the first of these it appears to be sufficient to state that, under the Commercial Convention, the former system under which the Turkish customs duties were limited to a uniform rate of 11 per cent. *ad valorem* is replaced by a provision that for a period of five years the duties shall be those fixed in the Turkish specific tariff which came into operation, without the consent of the Capitulatory Powers, on September 1, 1916; it being agreed that the payments in Turkish paper money shall be adjusted from time to time according to the variations in the rate of exchange.

The sanitary administration, which was formerly controlled by a Council of Health on which each of the Capitulatory Powers was represented, is abolished by Article 114 of the Treaty of Peace, by which the Turkish authorities are entrusted with the sanitary organization of the coasts and frontiers of Turkey. Under Article 115 a single sanitary tariff is to be applied to all ships without distinction between the Turkish flag and foreign flags and to nationals of foreign Powers in the same conditions as to nationals of Turkey. All questions relating to the pensioning of the former employees of the Council of Health, to the employment of the reserve funds of the Council and to the final liquidation of the former sanitary administration are, under Article 116, to be regulated by a commission *ad hoc* on which all the Powers formerly represented on the Council, with the exception of Germany, Austria and Hungary, have the right to be represented.

MINORITIES

The portion of the Turkish peace settlement which, next to that regarding the capitulations, has most deeply interested American public opinion is that which relates to the protection of the minorities. The proposal that Turkey set aside a portion of her territory as a national home for the Armenians having failed, it became a matter of the highest importance from the humanitarian standpoint that liberal provisions be made regarding the

treatment of the Armenians and other non-Moslem nationals of Turkey remaining within the frontiers of the country as determined by the Treaty of Peace. In this regard the attitude of the Turkish delegation at Lausanne and the provisions there agreed upon were based upon the following declaration in the fifth article of the National Pact of January 28, 1920: [4]

> The rights of minorities as defined in the treaties concluded between the Entente Powers and their enemies and certain of their associates shall be confirmed and assured by us—in reliance on the belief that the Moslem minorities in neighboring countries also will have the benefit of the same rights.

The treaties referred to in this article of the National Pact doubtless belong to the group of treaties concerning minorities signed by Czechoslovakia, Poland, Roumania, the Serb-Croat-Slovene State and Greece.[5] The last of these treaties, it should be noted, having been signed at Sèvres on August 10, 1920, was confirmed by Greece and the Principal Allied Powers in a protocol signed at Lausanne on July 24, 1923. The articles of the Treaty of Lausanne relating to minorities (Articles 37 to 45) reproduce, with the necessary modifications, the provisions incorporated in the treaties mentioned above. The Turks refused to agree to the insertion of provisions, such as those which appeared in Articles 142 and 144 of the Treaty of Peace signed at Sèvres, with a view to repairing the wrongs inflicted on members of the minorities in the course of the massacres perpetrated in Turkey during the war.

In the Treaty of Lausanne the Turkish Government undertakes to assure full and complete protection of life and liberty to all inhabitants of Turkey without distinction of birth, nationality, language, race, or religion, and to adopt measures permitting the settlement of questions of personal status and domestic relations affecting the non-Moslem minorities in accordance with their own customs. Turkey also agrees that Turkish nationals belonging to the non-Moslem minorities shall enjoy the same civil and political rights as Moslems and shall have an equal right to establish, manage and control charitable, religious, social and educational institutions at their own expense and with the right to use their own language and exercise their own religion freely therein.

Turkey undertakes that the stipulations in favor of the minorities shall be recognized as fundamental laws not subject to variation or interference by or under any law, regulation or official action. She further agrees that, in so far as they affect the non-Moslem nationals of Turkey, these stipulations constitute obligations of international concern and shall be placed under the guarantee of the League of Nations; that any member of the Council of the League shall have the right to bring to the attention of the Council, for such action as that body may deem proper and effective, any infraction

[4] See Toynbee, *op. cit.*, p. 210.

[5] Toynbee, *op. cit.*, p. 323.

or danger of infraction of these obligations; and that any difference of opinion as to questions of law or fact, arising out of the articles concerning the minorities, between the Turkish Government and any one of the other signatory Powers, or any other Power which is a member of the Council, shall be held to be a dispute of an international character which may, upon the demand of the other party, be referred for final decision to the Permanent Court of International Justice.

The last of the articles relating to minorities provides that the rights conferred by the foregoing stipulations on the non-Moslem minorities of Turkey shall be similarly conferred by Greece on the Moslem minority in her territory. It is possible that this provision may, through the manner of its application by Greece, operate as a guarantee no less effective than that of the League of Nations.

CONCESSIONS

The principal results of the protracted negotiations at Lausanne on the subject of concessions were embodied in a protocol signed by the British Empire, France, Italy, Greece, Roumania, and Turkey, and adhered to by Belgium. By the terms of this protocol concessionary contracts and subsequent agreements relating thereto, duly entered into before October 29, 1914, between the Ottoman Government or any local authority, on the one hand, and nationals of the contracting Powers other than Turkey, on the other hand, are maintained. These contracts and agreements are, however, to be brought into conformity with the new economic conditions, and if within one year from the coming into force of the Treaty of Peace the parties have not agreed upon a settlement of accounts and a readaptation of the concessions, they will adopt the recommendations of experts selected for the purpose. The states acquiring the territories detached from Turkey under the Treaty of Peace are to assume, by subrogation, the rights and obligations of Turkey towards the nationals of the other contracting parties under concessionary contracts or agreements affecting the detached territories.

The protocol contains special provisions in regard to further negotiations concerning the concessions claimed by one French company and two British companies. The Turkish Petroleum Company, whose claim to a concession has been contested by the United States in a diplomatic correspondence with the British Empire extending over four years, is not mentioned in the protocol nor in any other instrument in connection with the peace settlement. This claim was, however, made the subject of a reservation by the British delegation at the final session of the Economic Committee of the Conference.[6]

The protocol regarding concessions is important chiefly as embodying the principle of the readaptation of concessions granted by a government before the outbreak of war and regarded as suspended during the war. The omis-

[6] *Recueil des Actes de la Conférence, Deuxième Série, Tome I*, pp. 378, 379.

sion of reference to the concession claimed by the Turkish Petroleum Company is significant not only by reason of the incomplete and inchoate character of the concession claimed, but also by reason of the extensive scope of the privileges of exploitation which would have been established under this concession, both against Turkey and, by subrogation, against the new State of Iraq.

THE STRAITS

The fourth article of the Turkish National Pact reads as follows: [7]

> The security of the city of Constantinople, which is the seat of the Caliphate of Islam, the capital of the Sultanate, and the headquarters of the Ottoman Government, and of the Sea of Marmora must be protected from every danger. Provided this principle is maintained, whatever decision may be arrived at jointly by us and all other Governments concerned, regarding the opening of the Bosphorus to the commerce and traffic of the world, is valid.

The attitude of the Turkish delegation, pursuant to this article, was cited by Ismet Pasha, just before the break in the negotiations in February, 1923, as evidence of his disposition to conciliate the Allies in every possible way. He said: [8]

> We have abandoned the principle of the closing of the Straits, a principle which, as has been proved by past experience, is historically that which most adequately secures the safety of our capital, and we have agreed that the waters of the Straits shall be open to the ships of all nations. Further, in spite of the fact that in many cases where both shores of an open waterway belong to a single Power, that Power retains by usage the right of fortification, we have agreed in the present instance to demilitarization.
>
> We have also abandoned our request regarding the maintenance of a garrison in the Gallipoli peninsula.

Irrespective of the bearing of the attitude of the Turkish delegation regarding the Straits on the question of their disposition to conciliate the Allies, it appears that Turkey, in consenting to the convenient régime which was adopted for securing the freedom of the Straits, did in fact render the security of her former capital largely dependent upon the good faith of the Allies and the efficacy of the measures which may be recommended by the Council of the League of Nations. The principal provisions of this régime may be indicated briefly.

Merchant vessels, including hospital ships, yachts and fishing vessels, and non-military aircraft, are in time of peace, and also in time of war if Turkey is neutral, to be allowed free navigation and passage of the Straits without formalities and without charges except for services rendered. In

[7] Toynbee, *op. cit.*, p. 210.

[8] Turkey No. 1 (1923), Lausanne Conference on Near Eastern Affairs 1922–1923, Cmd. 1814, p. 838.

time of war when Turkey is a belligerent, neutral merchant vessels and non-military aircraft not assisting the enemy are to be accorded the same freedom of navigation and passage as in time of peace, subject to the exercise by Turkey of the right of visit and search and of other rights under international law. Turkey will be free, when she is a belligerent, to take measures to prevent the use of the Straits by enemy vessels, but such measures must not be of a nature to prevent the free passage of neutral merchant vessels and Turkey must provide the necessary instructions or pilots for such vessels.

Warships, including fleet auxiliaries, troopships, aircraft carriers, and military aircraft, are in time of peace to be accorded the same privileges as merchant vessels, subject to the restriction that the maximum force sent by any one Power into the Black Sea must not exceed that of the most powerful fleet of the littoral Powers of the Black Sea, actually in the Black Sea and in active commission; provided, however, that the Powers reserve the right to send into the Black Sea at any time a force of not more than three ships, none of which shall exceed ten thousand tons. In time of war, when Turkey is neutral, the same rules are to apply to the navigation and passage of warships as in time of peace, except that the limitations imposed cannot be allowed to prejudice the exercise of belligerent rights in the Black Sea. Turkey, on the one hand, cannot as a neutral take measures which are likely to interfere with navigation through the Straits, and, on the other hand, no hostile act can be committed in the Straits. In time of war, when Turkey is belligerent, neutral warships are to be accorded the same rights as in time of peace, but they will enter the Straits at their own risk and must submit to investigation as to their character. The measures taken by Turkey to prevent enemy ships and aircraft from using the Straits must not be of such a nature as to prevent the free passage of neutral ships, and Turkey must provide the necessary instructions or pilots.

The Zone of the Straits as defined in the commission is to be demilitarized. Within this zone, except for a garrison of 12,000 men, as arsenal, and a naval base at Constantinople, there are to be in time of peace no fortifications, no permanent artillery organization, no submarine engines of war other than submarine vessels, no military aerial organization, no naval base, and no armed forces other than the police and gendarmerie necessary for the maintenance of order. Turkey will, however, retain the right to transport her armed forces through the demilitarized zone, and the Turkish fleet will have the right to anchor in the Turkish territorial waters within the zone. It is, moreover, contemplated that in case of war, Turkey or Greece, in pursuance of belligerent rights, may modify the provisions of demilitarization; in such case the régime laid down in the convention is to be reëstablished upon the conclusion of peace.

The observance of the provisions relating to the passage of warships and military aircraft is to be assured by an International Straits Commission to be established at Constantinople under the auspices of the League of

Nations, with a membership including a representative of Turkey, as chairman, and representatives of France, the British Empire, Italy, Japan, Bulgaria, Roumania, Russia and the Serb-Croat-Slovene State, and also a representative of the United States if this country adheres to the convention.

If the freedom of navigation or the security of the demilitarized zone be imperiled by a violation of the provisions concerning the freedom of passage, or by surprise attack or act or threat of war, the contracting parties and, in any case, France, Great Britain, Italy and Japan, without prejudice to their rights and obligations under the Covenant of the League of Nations, are to meet such violation, attack, or act or threat of war by all the means that the Council of the League of Nations may decide upon for the purpose.

REPARATIONS

In the Treaty of Peace signed at Sèvres on August 10, 1920, the Allied Powers, recognizing that the resources of Turkey, after the territorial rearrangements provided for in the treaty, were "not sufficient to enable her to make complete reparation" and "desiring to afford some measure of relief and assistance to her" (Article 231), agreed that all the resources of Turkey, except revenues conceded or hypothecated to the Ottoman Public Debt, should be placed at the disposal of a financial commission to be designated by the Allies and that, due regard being had to the financial condition of Turkey and the necessity for providing for the essential expenses of its administration, these resources, after the payment of the salaries and current expenses of the commission and the ordinary expenses of the Allied forces of occupation to be maintained in Turkish territory after the coming into force of the treaty, should be applied, as need might arise, first to the payment of the expenses of the Allied forces of occupation since October 30, 1918, and, secondly, to the payment of indemnities on account of the claims of the Allied Powers for the losses suffered by their nationals during the war (Article 236). Among the resources to be placed at the disposal of the Financial Commission were mentioned (in Article 253) the sums in gold which were to be transferred by Germany and Austria under the provisions of Article 259 (1), (2), (4) and (7) of the Treaty of Versailles and Article 210 (1) of the Treaty of St. Germain.

In the Treaty of Lausanne (Article 58) Turkey and the other contracting Powers, except Greece, reciprocally renounce all pecuniary claims for the loss and damage suffered by them and their respective nationals as the result of acts of war or measures of requisition, sequestration, disposal, or confiscation between August 1, 1914, and the coming into force of the Treaty of Peace. Turkey renounces in favor of the other contracting parties, except Greece, any right to the sums in gold, approximately twenty-five million dollars, transferred by Germany and Austria under Article 259 (1) of the Treaty of Versailles and Article 210 (1) of the Treaty of St. Germain. Turkey also renounces all claim to the repayment of the sums, approximately

twenty-five million dollars, paid for the warships ordered in England by the Ottoman Government before the war and requisitioned by the British Government in 1914. As between Turkey and Greece the question of reparations is disposed of by the provision, in Article 59, that Greece recognizes her obligation to indemnify Turkey but that Turkey, in view of the financial condition of Greece, relinquishes her claim. There is nothing in the Treaty of Lausanne to indicate that the Allies ever proposed to take over the entire resources of Turkey for an indefinite period and apply them to the payment of reparations.

When the question of reparations came up for discussion at Lausanne, Ismet Pasha announced that the Turkish delegation stood ready to compare the respective amounts of damage suffered by Turkey and the Allies and to pay any balance which might be shown against Turkey. He intimated, however, that in the opinion of the Turkish delegation the devastations wrought by the Greek armies in Turkey might be found, upon investigation, to be more than sufficient to wipe out any claim of the Allies on account of reparations.[9] The final agreement under which fifty million dollars were made available for the reparation of the war losses suffered by the nationals of the Allied Powers other than Greece was without doubt due less to a deliberate striking of a balance between Allied and Turkish claims than to the fortuitous circumstance that the sums released by Turkey were already in the hands of the Allies.

The moderation of the provisions in the Treaty of Lausanne on the subject of reparations, as contrasted with the provisions in the Treaty of Sèvres on the same subject, is as significant as it is striking. This moderation may have been due in part to a genuine conversion of the Allies to the belief that the earlier treaty was not wholly fair to the Turks. A more important element in the explanation was undoubtedly the fact that between the dates of the Armistices of Mudros and Mudania Turkey had ceased to be a suppliant for peace at the hands of the Allies and had become, not only a victor over Greece, but an adversary prepared to oppose the Allies by force of arms rather than submit to more than a certain maximum of sacrifices which had been indicated in the National Pact.

GENERAL OBSERVATIONS

The moderation noted in the provisions regarding reparations is equally present, though less striking, in the other provisions of the settlement of Lausanne. That it was in fact moderation, and not surrender to Turkish demands, is indicated not only by the liberality of the régime established regarding the Straits and by the substantial character of the safeguards provided for the non-Moslem minorities and for foreigners residing in Turkey, but also by the fact, which is sometimes overlooked, that by the terms of the settlement Turkey loses the major portion of the territory of the

[9] Turkey No. 1 (1923), Cmd. 1814, p. 625.

former Ottoman Empire. The Turkish delegates had, on the whole, good reason to be pleased with what they accomplished at Lausanne, but their success was due as much to the thoroughness of their preparation and to the single-mindedness of their devotion to the principles consecrated in the National Pact as it was to the realization of the Allies that Turkish armies were ready to renew fighting at a moment's notice and that public opinion in the Allied countries would not countenance further sacrifices of men and money for the enforcement of the maximum demands made upon Turkey.

At the concluding session of the Conference of Lausanne Ismet Pasha expressed his gratification at the happy issue of the negotiations, which, he said, had been "conducted on a footing of equality." The Turkish plenipotentiaries, he continued, had not failed to point out on every occasion that their country was worthy of the full and complete independence enjoyed by all civilized countries. They were going to sign the Treaty of Peace in the belief that it was based upon the recognition of the equality and independence of Turkey and they were determined to apply its provisions loyally.

With the Treaty of Peace and the other parts of the settlement duly brought into force, Turkey will now have the opportunity to make good the assurances which she gave in return for her emancipation. In view of the novelty and difficulty of the tasks with which she is confronted, especially since the proclamation of the Republic and the abolition of the Caliphate, it will probably be necessary for some time to come to judge her more by her evident intentions than by her accomplishments. During this time there will no doubt be frequent occasions for the invocation of the good offices of the Ministry of Foreign Affairs for the adjustment of difficulties arising in connection with administrative acts or judicial decisions. It is to be hoped that these occasions will steadily decrease in frequency, and that Turkey will soon succeed in proving to the satisfaction of all concerned her ability, as well as her desire, to fulfil all the obligations incumbent upon her under that régime of international law which she urged at Lausanne as the only proper basis for the regulation of her dealings with foreign Powers and their nationals.

THE LONDON CONFERENCE ON THE APPLICATION OF THE DAWES PLAN[1]

By George A. Finch

Managing Editor

The Dawes plan for recovering the reparation debt of Germany to the Allies under the Treaty of Versailles[2] was accepted by all of the interested parties at London on August 16, 1924, and certain agreements necessary to enable the plan to be brought into operation were drawn up and initialed. Formal signatures to them were attached on August 30th after the French Parliament had approved the work of the conference on August 24th and 26th, and the laws for carrying the plan into effect had been passed by the German Reichstag on August 29th. The process of putting the plan into operation was thereupon promptly started. Immediately after the signatures had been attached on August 30th, the French Government issued instructions for the evacuation of a section of the Ruhr, and the Reparation Commission on the same day announced the appointment of the principal officials who are to administer the plan, namely, the Agent General for Reparation Payments, Mr. Owen D. Young of the United States, *ad interim* (the appointment of Mr. Seymour Parker Gilbert, formerly Assistant Secretary of the United States Treasury, as the permanent Agent General was announced September 4th); Trustee of the Railway Bonds, M. Delacroix of Belgium; Trustee of the Industrial Debentures, Signor Nogara of Italy; Commissioner of Controlled Revenue, Mr. Andrew McFadyean of Great Britain. Two days later, namely, on September 1st, the first instalment of twenty million (20,000,000) gold marks, due from Germany under the plan, was paid to the Agent General for Reparation Payments, and the second instalment was promptly paid ten days later. On September 4th, the restrictions placed upon the movement of persons, goods and vehicles between occupied and unoccupied Germany were removed, and four days later the eastern customs line between the same territories was abolished. On September 10th, the first of the Ruhr political prisoners were set at liberty.

Negotiations lasting exactly one month were required to reach the agreements for putting the Dawes plan into operation. The London Conference opened on July 16th and the agreements were completed and ready for

[1] The official proceedings of the conference are not available at the time of writing this article. For the facts and information contained herein, use has been made of the London *Times* for July and August and the first half of September, especially the daily accounts of the conference published during its sessions.

[2] For a summary of the Dawes plan, see the article in our last issue, July, 1924, pp. 419–435.

signature on August 16th. In its organization and procedure the conference resembled in some respects the Conference at Versailles in 1919. It was divided into two stages, first, the discussions between the Allies, and secondly, the negotiations with the Germans. In the first stage, the Allied countries having a direct interest in reparation payments by Germany took part, namely, Belgium, British Empire (with the British Dominions and India represented by one delegate alternating on the panel system), France and Italy, who were represented by their Prime Ministers, Greece, Japan, Portugal, Rumania and the Serb-Croat-Slovene State, who were represented by their diplomatic envoys at London. The United States was represented by its ambassador at London, with especially limited powers, but he did not sign any of the agreements.

Mr. Ramsay MacDonald, the British Premier, was elected President, and Sir Maurice Hankey, Secretary-General. The program adopted was contained in a Franco-British memorandum of July 9th,[3] and the topics on it were assigned to three committees to consider and report, respectively, upon first, the procedure of declaring Germany in default under the Dawes plan, and the measures to be taken in such event; second, a plan by which German economic and fiscal unity should be restored; third, methods of making transfers of payments and deliveries in kind from Germany to the creditor countries. A legal committee was later appointed to report upon the proper arrangements to be made with Germany for putting the Dawes report into operation without running counter to the Treaty of Versailles, and upon provisions for modifying the Dawes report, if necessary, and interpreting it after it became operative.

The work of the committees was finished and their reports approved on August 2nd,[4] when an invitation was sent to Germany to attend the conference. The second stage began on August 5th, when the German delegation, headed by Chancellor Marx, arrived; but here the resemblance to the Versailles Conference disappeared. Mr. MacDonald informed the Germans that there was a common desire to attach signatures only after discussions in which every party had been fairly heard. He handed them copies of the committee reports previously agreed upon and invited them to submit comments in writing. After this was done, the German comments were classified and referred to the original committees of the conference, which were reconstituted with German members to deal with the German emendations. In summarizing the work of the conference at its closing session on August 16th Mr. MacDonald referred to this phase of it as follows:

[3] Printed in British parliamentary paper, Misc. No. 12 (1924). For the correspondence concerning a previous program which met with vigorous opposition in France, see Misc. No. 10 (1924).

[4] The text of the reports of the First and Third Committees is printed in the London *Times*, Aug. 4, 1924, p. 13. A summary of the report of the Second Committee is printed in the *Times*, July 29, p. 12. The text of two reports by the Committee of Jurists is printed in the *Times*, July 29, p. 14, and Aug. 4, p. 13.

> I believe we have given Europe something better than an agreement drafted by lawyers and printed on paper—we all negotiated, discussed, put ourselves in each other's shoes. That is the greatest advance we have made, even when, in the end, one side or the other has been disappointed with the result. We are now offering the first really negotiated agreement since the war; every party here represented is morally bound to do its best to carry it out, because it is not the result of an ultimatum. We have tried to meet each other as far as the public opinion of the various countries would allow us. This agreement may be regarded as the first Peace Treaty, because we sign it with a feeling that we have turned our backs on the terrible years of war and war mentality.[5]

The conference had to deal with numerous questions, some of an intricate technical nature involved in the practical operation of the Dawes plan, which could be and were solved by the experts on the committees, and others of an important political character which could only be decided by the heads of government in council. In the Inter-Allied stage of the conference, the question of declaring a German default in the execution of the Dawes plan was the most difficult to solve. The British Government entered the conference in its antipathetic attitude toward the Reparation Commission, and seemed determined that the commission should not be vested with the power of declaring Germany in default under the Dawes plan, which it was argued exceeded the Peace Treaty provisions in the matter of deliveries in kind. France seemed equally determined to maintain the powers vested in the Reparation Commission by the Treaty of Versailles, seeking to keep the Dawes Committee within the position which it technically occupied, namely, that of a subordinate agency appointed by the Reparation Commission.

During the second stage of the conference, the overshadowing question was the military evacuation of the Ruhr. The German delegates naturally wished this to come about as soon as possible, and suggested six months as the maximum period during which evacuation should be accomplished. The British Government, although it did not take a formal part in these negotiations, informally made the military evacuation of the Ruhr a *sine que non* of her signature to the London agreements, and took the ground that military evacuation should take place concurrently with the economic evacuation. The French and Belgian Governments were disinclined to give up their hold on the Ruhr until the successful working of the Dawes plan had been demonstrated, and proposed two years as the maximum time within which their military forces should be withdrawn. In this connection, the French and Belgians also proposed that a few thousand of their nationals should be retained in the employ of the railways in the Ruhr for the security of their troops in the event of a German strike, and to be used as a nucleous in case reoccupation became necessary.

[5] London *Times*, August 18, 1924, p. 16.

As will be seen in the following analysis of the agreements, the main questions in dispute were compromised. The Reparation Commission retains jurisdiction of the question of German defaults, but an American is to be added when the commission is considering any point relating to the Dawes report, and the provisions of the Treaty of Versailles are amended so as to provide for appeals to an arbitral commission from decisions of the commission upon German defaults either under the Treaty or the Dawes plan. The complete military evacuation of the Ruhr within one year was promised by France and Belgium, and they gave up their demand for the retention of employees on the German railways.

The documents embodying the arrangments of the conference at London consist of a protocol stating the general results, and four annexed agreements: (I) between the Reparation Commission and the German Government, containing their respective undertakings to put the Dawes plan into effect; (II) between the Allied Governments and the German Government, concerning Agreement No. I; (III) between the Allied Governments and Germany, enumerating the various steps to be taken on either side in order to put the plan into execution; (IV) an agreement between the Allies amending Annex II to the reparation clauses of the Treaty of Versailles.[6]

By Agreement No. I, which was signed on August 9th,[7] the German Government undertakes to enact and enforce the laws and regulations required to carry out the recommendations of the Dawes plan, especially concerning the establishment of the bank of issue, the German railways, industrial debentures, and the control of the revenues assigned as security for the reparation annuities. On its part, the Reparation Commission agrees to take proper measures to facilitate the issue of the German loan required by the Dawes plan, and to make all financial adjustments necessary to give effect to the plan.

By Agreement No. II, the Allied Governments and Germany agree to submit to arbitration all disputes which may arise between the Reparation Commission and Germany with regard to the interpretation of Agreement No. I, the Dawes plan, or the German legislation enacted in execution of that plan. The arbitral body is to consist of three members appointed for five years, one by the Reparation Commission, one by the German Government, and the third by agreement between them, or, failing such agreement, by the President of the Permanent Court of International Justice. The agreement then deals with the functions of the Transfer Committee, and provides a system of arbitration for the settlement of disputes relating to this section of the Dawes report.

The Dawes plan provides that all reparation payments are to be deposited

[6] The text of the protocol and agreements is printed in the London *Times*, Aug. 18, 1924, pp. 15–16. As soon as an official text is available, it will be printed in the SUPPLEMENT to the JOURNAL.

[7] The other three agreements were initialed Aug. 16th and signed Aug. 30th.

in the bank of issue to the credit of the Agent for Reparation Payments, who may withdraw them only under the direction of the Transfer Committee, which is composed of an American, French, English, Italian and Belgian member, with the Agent for Reparation Payments as chairman. The Transfer Committee is empowered by the plan to apply the bank balances (a) to payments for deliveries in kind; (b) to convert them into foreign currencies for remission in accordance with the instructions of the Reparation Commission; and (c) to invest them under certain conditions in bonds or other loans in Germany.[8]

In this connection it should be noted that the Treaty of Versailles enumerates the products which may be demanded in kind and limits the period during which they are to be delivered. Under the treaty, coal and coke deliveries expire in 1930, and dyestuffs and chemicals in 1925. The Dawes Committee gave special attention to the question of deliveries in kind, which, it said, are not really distinguishable from cash payments in their financial effects. The committee recommended the continuance of such deliveries of the natural products of Germany and of exports which do not entail the previous importation into Germany of a large percentage of their value. If not carried too far, the Dawes Committee thought that such deliveries would create a greater export surplus by stimulating German productivity and keep the reparation transfer as large as possible.[9]

By London Agreement No. II, Germany recognizes the right of the Transfer Committee to employ reparation funds to make payments for deliveries in kind on customary commercial conditions of any commodities or service, regardless of the limitations fixed by the Treaty of Versailles either as to the nature of the products or the time of delivery. Provision is also made for continuing deliveries in kind of the products enumerated in the Treaty of Versailles after the fulfilment by Germany of her treaty obligations. It is stipulated, however, that the programs for both classes of deliveries shall be fixed with due regard to the possibilities of production in Germany, to the position of her supplies of raw materials and to her domestic requirements in so far as is necessary for the maintenance of her social and economic life and also with due regard to the limitations set out in the Experts' Report. Disputes as to these programs of deliveries will be referred to an arbitral commission of three members, appointed in advance for a definite period by agreement between the Reparation Commission, acting unanimously, and the German Government, or, in default of agreement, by the President of the Permanent Court of International Justice. The chairman of this commission is to be a citizen of the United States. The same commission is given power to consider and act upon complaints of wilful discrimination or obstruction on the part of the German Government or its nationals in the

[8] Annex 6 to the Dawes Report, British parliamentary paper, Cmd. 2105, pp. 110–112.
[9] Cmd. 2105, pp. 33 *et seq.*

matter of commercial contracts between the Allied Governments or their nationals and the German suppliers of deliveries in kind.

To determine the procedure of placing orders and the conditions for carrying out deliveries in kind, the London agreement constitutes a special committee of six, composed of three Allied representatives to be appointed by the Reparation Commission, and three members to be appointed by the German Government, with power to select a neutral additional member in the event of a difference. This special committee also has certain advisory functions in regard to facilitating deliveries in kind, limiting their anti-economic character, and recommending measures to enforce the prohibition of the Dawes report against the reexportation of such deliveries.

Article VI of Annex 6 to the Dawes report gives the Transfer Committee the power to transfer marks to private individuals for the purpose of making purchases of a permanent character in Germany from a schedule of property to be agreed upon between the Transfer Committee and the German Government. In arriving at such agreement, the report states that the German Government shall be required to have due regard to the necessity for making maximum payments to its creditors, but it shall also be entitled to have regard to maintaining control over its own internal economy. The London agreement provides that differences of opinion which may arise between the Transfer Committee and the German Government regarding the execution of this section shall be referred to an arbitrator to be chosen by agreement between the two parties, or, in default of agreement, to be nominated by the President of the Permanent Court of International Justice.

Article VIII of Annex 6 of the Dawes report provides that in the event of concerted financial maneuvers, either by the government or by any group, for the purpose of preventing transfers, the Transfer Committee may take such action as may be necessary to defeat such maneuvers. The London agreement provides that if the Transfer Committee is equally divided as to whether such concerted financial maneuvers have been set on foot, the question shall be referred to an independent and impartial arbitrator, selected by the Transfer Committee in agreement, or, in default of an agreement, by the President of the Permanent Court of International Justice. Majority decisions of the Transfer Committee taken under this article, and under Article X of the same Annex, which limits the accumulation of funds at the disposal of the Agent General for Reparation Payments, may be appealed by a member of the minority to an arbitral tribunal, consisting of three financial experts to be selected unanimously by the Transfer Committee, or, failing unanimity, by the President of the Permanent Court of International Justice. This tribunal is to include a citizen of the United States, who shall act as chairman.

London Agreement No. II provides finally that if any interested government, Allied or German, considers that a defect exists in the technical working of the Dawes plan which can be remedied without affecting substantially

the principles of the plan, it may submit the question to the Reparation Commission, and that body is required to take the advice of the Agent General for Reparation Payments, the Trustees for the Railway and Industrial Mortgage Bonds, the Railway and Bank Commissioners, and the Commissioner of Controlled Revenue, acting as a committee. If, after receiving the report or reports of this committee, the Reparation Commission arrives at a unanimous decision, which is accepted by the German Government, the necessary measures will be carried into effect without delay. If the Reparation Commission is not unanimous, or, if its unanimous decision is not accepted by the German Government, any of the interested parties may submit the question to a committee of three experts, chosen by agreement between the Reparation Commission deciding unanimously and the German Government, or, in default of such agreement, by the President of the Permanent Court of International Justice. The provisions of this paragraph do not cover any question in regard to the disposal of the funds paid to the account of the Agent General for Reparation Payments, or to any matter which falls solely within the competence of the Transfer Committee.

Agreement No. III of the London Conference provides that the Dawes plan will be considered as having been put into execution by Germany when certain measures have been taken as prescribed in the decision of the Reparation Commission of July 15, 1924,[10] *i.e.*, the voting and promulgation of the laws necessary to the working of the plan and the installation of the executive and controlling bodies provided by it; the constitution of the bank and railway company, the deposit with trustees of certificates representing the railway bonds and industrial debentures, and the conclusion of contracts assuring the subscription of the loan.

The agreement states that the fiscal and economic unity of Germany will be considered as having been restored, as required by the Dawes plan, when the Allied Governments have removed all vetoes on German fiscal and economic legislation imposed since the occupation of the Ruhr, reestablished the German authorities in the economic and fiscal administration of the territories then and since occupied, reformed the administration of the Rhineland territories to accord with the agreement of June 28, 1919, restored to their owners the industrial, agricultural, and other undertakings seized during the Ruhr occupation and withdrawn all special organizations established to exploit them, and removed all restrictions on the movement of persons, goods and vehicles, except as provided by the Rhineland agreement of June 28, 1919.

The following dates are specified in the agreement upon which the various steps are to be taken in order to bring the Dawes plan into full operation by October 5, 1924: [11]

[10] For the text of this decision, see the London *Times*, July 17, 1924, p. 14.

[11] As the conference lasted beyond the time originally contemplated in the draft agreement, the dates specified were extended seventeen days by the protocol.

August 15th. The German laws to be promulgated and the Agent General for Reparation Payments to assume his duties.

August 23rd. Eight days after the promulgation of the German laws, the customs barrier between occupied and unoccupied Germany to cease.

September 5th. Twenty days after the same event, the restrictions imposed since January 11, 1923, on movements of persons, goods and vehicles between occupied and unoccupied Germany to be removed.

September 20th. The other measures prescribed in the decision of the Reparation Commission of July 15th to be fulfilled.

October 5th. The Allied program for the restoration of Germany's fiscal and economic unity to be fulfilled.

Remittances to the Agent General for Reparation Payments are to be made by Germany every ten days, in such amounts as will place in his hands each month one-twelfth of the first annuity provided by the Dawes plan, the first remittance to be made on August 15, 1924. Until the economic and fiscal evacuation of the Ruhr has been completed, provision is made for deducting from the German payments the amounts of collections and charges levied by France and Belgium, including the net profits of the railways, less an allowance of two million gold marks per month to cover the cost of collection. The amounts of such collections and charges are to be paid by the French and Belgian occupying authorities to the Agent General for Reparation Payments. Provision is also made for deducting from the German payments the amount of receipts from the British Reparation Recovery Act and similar acts of the Allied Governments, and of the paper marks supplied to the armies of occupation.

Upon the fulfillment of the measures to be taken by September 20th, the railway system of the Reich will be transferred to and operated by the new company provided by the Dawes plan. Beginning October 5th, the lines operated by the French and Belgian Regie will be worked on account of the new company, under the control of a Railway Organization Committee, and upon the signature of the present agreement the details of the actual transfer are to be worked out between the regie and the committee so that the transfer will be completed by November 20th.

The agreement grants an amnesty for political offenses committed in occupied territories since January 11, 1923, except crimes against life resulting in death, and for the remission of all sentences and penalties imposed for them, except that fines already paid will not be reimbursed. Mixed commissions set up by common agreement will be utilized to solve any disagreements growing out of the fulfillment of these provisions.

Any disputes between allied merchants and the German authorities, arising out of the change of régime, will also be decided by mixed commissions.

Finally, the agreement provides that the Permanent Court of International Justice will settle all disputes which may arise between the Allied Govern-

ments, or any one of them, and Germany, which can not be settled by negotiation.

The fourth agreement of the London Conference provides for the modification of Annex 2 to Part VIII of the Treaty of Versailles, with reference to declarations of default and sanctions. As under the treaty this Annex may be amended by the governments represented upon the Reparation Commission, Germany is not a party to the present agreement. The agreement provides that a citizen of the United States shall be added to the Reparation Commission when it is deliberating on any point relating to the Dawes Report. He is to be appointed for five years by the Reparation Commission acting unanimously, and lacking unanimity, the appointment is to be made by the President of the Permanent Court of International Justice (new paragraph No. 2 A).

Another new paragraph (No. 16 A), is to be inserted in the Annex providing that if the decision of the Reparation Commission upon any application that Germany be declared in default in her obligations, either under the Treaty of Versailles or the Dawes Report, has been taken by a majority, any member who has participated in the vote may within eight days appeal from the decision to an arbitral commission of three members, to be appointed in the same manner and for the same period as the American member on the Reparation Commission. The adoption of this amendment made necessary a modification of Paragraph 17 of Annex 2, to bring it into conformity with the new procedure.

The London agreement next deals with the question of the sanctions which may be imposed on Germany under Paragraph 18 of Annex 2 of Part VIII of the Treaty of Versailles. It was under this paragraph that France, Belgium and Italy claimed and exercised the right, without the concurrence of Great Britain, of going into the Ruhr to compel Germany to meet her reparation obligations. It reads as follows:

> The measures which the Allied and Associated Powers shall have the right to take, in case of voluntary default by Germany, and which Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the respective governments may determine to be necessary in the circumstances.

Article 2 of the London agreement stipulates that sanctions will not be imposed on Germany in pursuance of Paragraph 18 of Annex 2 "unless a default within the meaning of Section III of Part I of the report of the said Committee of Experts [Dawes Report] has been declared under the conditions laid down by the said Annex as amended in conformity with this agreement."

Section III of Part I of the Dawes Report is rather curiously worded. It begins with a statement that political guarantees and penalties and questions of military occupation fall outside the committee's jurisdiction, and

then proceeds to define the conditions and manner in which the sanctions of this nature already imposed may be reimposed. The section is short and the pertinent paragraphs read as follows:

> III. MILITARY ASPECTS. *Contingent Sanctions and Guarantees:* If political guarantees and penalties intended to ensure the execution of the plan proposed are considered desirable, they fall outside the Committee's jurisdiction.
>
> Questions of military occupation are also not within our terms of reference.
>
> It is however our duty to point out clearly that our forecasts are based on the assumption that economic activity will be unhampered and unaffected by any foreign organization other than the controls herein provided. Consequently, our plan is based upon the assumption that existing measures, in so far as they hamper that activity, will be withdrawn or sufficiently modified so soon as Germany has put into execution the plan recommended, and that they will not be re-imposed except in the case of flagrant failure to fulfil the conditions accepted by common agreement. In case of such failure it is plainly for the creditor Governments, acting with the consciousness of joint trusteeship for the financial interests of themselves and of others who will have advanced money upon the lines of the plan, then to determine the nature of sanctions to be applied and the method of their rapid and effective application.[12]

It will be noted first that Paragraph 18 refers to sanctions in case of "voluntary default" by Germany, while Section III refers to them in case of "flagrant failure" to fulfil accepted conditions. This difference of terminology was the subject of discussion in the British Parliament on August 5, 1924, and Prime Minister MacDonald there gave an interpretation of the word "flagrant," which, it is reported,[13] was accepted by the "Council of Fourteen" (Allied Premiers and Ministers) at London on August 7th, but the interpretation does not appear in the published documents. Mr. MacDonald's definition, given to the House of Commons on August 5th, was as follows:

> The default which is a serious one, and which comes before the Reparation Commission, is a large general default, a default which cannot be judged to be a mechanical default, a default which it can be alleged and about which evidence can be presented,—"This could not have taken place unless there was a conspiracy in high places to throw off obligations undertaken in August, 1924, by the German Government to put this report into operation." [14]

The London agreement then provides, in case a default has been declared in accordance with the conditions previously specified, that

[12] Cmd. 2105, pp. 13–14.

[13] London *Times*, Aug. 9, p. 10.

[14] This wording, which appears in the London *Times* of Aug. 9, p. 10, is slightly different from the report of Mr. MacDonald's statement in the House of Commons published in the *Times* of Aug. 6, p. 6, column 4.

> The signatory governments, acting with the consciousness of joint trusteeship for the financial interests of themselves and of the persons who advance money upon the lines of the said plan, will confer at once on the nature of the sanctions to be applied and on the method of their rapid and effective application.

It will now be observed that while this article follows generally the wording of the last half of the third paragraph of Section III of the Dawes Report, it contains a very material and important modification. Section III seems to contemplate that any sanctions to be imposed upon Germany will be *determined* by the creditor governments acting jointly, but the London agreement changes this provision to read so that the creditor governments are obligated only to *confer* as to the nature of the sanctions.

In the Inter-Allied stage of the London Conference the possible effect upon the loan to Germany, recommended by the Dawes Report, of a declaration of default by the Reparation Commission was used as an argument for taking the power of declaring defaults out of the hands of the commission. The situation was thus stated by Mr. MacDonald in the House of Commons on August 4th: "On the British and American markets confidence in the Reparation Commission as a judicial body for declaring default has been completely forfeited, and we were informed that so long as it could destroy the economy and credit of Germany by a declaration of default which, as a matter of fact, might not exist, the security for the loan would be of so little value that the loan would not be subscribed." [15]

When the possibilities of this buga-boo as a political lever had been exhausted [16] it was a simple matter for the Allied Governments to agree, as they did in the agreement under analysis, that in case sanctions are imposed, priority would be given to the service of the loan, not only as regards the resources pledged to its service, but as to resources which may arise from the imposition of sanctions, and that any dispute arising under the agreement between the signatories regarding the imposition of sanctions and the security for the loan are to be submitted to the Permanent Court of International Justice.

The agreement finally reserves to the signatory governments all of their existing rights under the Treaty of Versailles, unless otherwise stipulated.

The military, as distinct from the economic and fiscal, evacuation of the Ruhr was considered by the Allies to be outside the scope of the London

[15] London *Times*, Aug. 5, 1924, p. 4.

[16] The alleged interference in the negotiations of the so-called "international bankers," was greatly resented in France, and Mr. MacDonald in this connection made the following statement on the occasion above referred to: "I may take this opportunity of expressing my regret that it has been so often stated that the difficulties we encountered in this part of our work were created by bankers and financiers. They confined themselves to advising as to the state of mind of the investing public, and guided us against coming to agreements that would fail to produce the loan required. We are all much indebted to them for the information and help they gave us."

Conference, but the German delegates placed this question at the head of their agenda for discussion. It was taken up in separate negotiations between the French, Belgian and German plenipotentiaries, and the result embodied in an exchange of notes on August 16th in which France and Belgium agreed, if the London agreements are carried out in good faith by Germany, to proceed to the military evacuation of the Ruhr within a maximum period of one year from the date of the agreements. As an earnest of their intention to hasten the evacuation, France and Belgium decided that the day after the London agreements were signed the military should evacuate the zone between Dortmund and Horde in the Ruhr and territories outside the Ruhr occupied since January 11, 1923. In these notes the German Chancellor maintained the view "that the occupation of German territories beyond the German frontiers fixed by Article 428 of the Treaty of Versailles cannot be recognized as lawful." The British Prime Minister also wrote a letter to the French and Belgian Premiers in which he took note of the agreement with Germany, reiterated the position of the British Government as to the illegality of the occupation of the Ruhr under the Treaty of Versailles, and urged that the evacuation be hastened as much as possible "as, in the opinion of the British Government, the continued occupation may prejudice the working of the Dawes plan, and jeopardize the arrangements agreed to at the London Conference." [17]

The principle of arbitration, so generously drawn upon by the conference to reach agreement when other suggestions of settlement failed, was the keynote of the closing speeches of the principal delegates.

"I should like to impress upon the German people," said the British Prime Minister, "that as the result of this conference we have created a system of arbitration, of examination, of revision, which will enable both them and us to observe the working of the Dawes plan; to watch projects that may be doubtful in their effects and to come together in a sincere desire to rectify mistakes so soon as those mistakes are discovered."

In his reply the French Premier said: "France is happy in seeing that you have accepted to write on the front of the London document this idea of arbitration which we all hope will be generalized in order to substitute for the atrocious rule of war a régime of conventions based upon right and legality."

The American Ambassador concurred with the following statement: "There is one feature of this settlement which I wish to emphasize, and that is the recognition and furtherance of the principles of arbitration for settlement of international disputes. In my opinion, the greatest hope for the peace of the world lies in arbitration and judicial settlement between nations, and I am very glad this conference has contributed so much to forward this plan."

[17] The notes exchanged are printed in the London *Times*, Aug. 18, 1924, p. 16, and Mr. MacDonald's letter is in the *Times* of Aug. 19, p. 10.

The conference closed with an expression of hope on the part of the German Chancellor that "the principle of arbitration, to which other speakers have referred, may evermore be applied in regulating the relations of the different peoples to each other, and thus help to establish a better adjustment of affairs."

Postscriptum

The contract for the loan of 800,000,000 gold marks to Germany under the Dawes plan was signed at London on October 10, 1924. (New York Times, October 11, 1924.) On October 13, 1924, the Reparation Commission approved a series of decisions to give effect to the terms of the loan and declaring that all conditions attached to the Dawes plan had been complied with and that the plan is now legally binding on Germany (New York Times, October 14, 1924). Subscriptions to the loan were opened on October 14 and it was at once oversubscribed (New York Times, October, 15, 1924).

CITIZENSHIP OF MARRIED WOMEN

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Many recent comments have been made with respect to the wisdom of Congress in passing the Act of September 22, 1922, entitled, "An act relative to the naturalization and citizenship of married women," commonly known as the Cable Act, and which granted a form of independent citizenship to women.[1] Among these comments we find the phrase, "probably accidental reasons," and an expressed sentiment that it is "questionable whether the majority of the women of this country really wanted the new law," and similar suggestions. It has been intimated that the law was passed solely as the result of the persuasive efforts of a minority of women.[2] In many instances little cognizance has been taken of the reasons for, and the actual facts involved in, the change.

It is well to reflect upon some of the conditions and circumstances which have really made imperative the reform which occasioned the passage of the act. Just because error is gray with age, is no reason why it should be respected. Nor is novelty a reason why it should be accepted. Was this act an unwarranted innovation? Can it be considered a step towards allowing a woman to take her husband's name in vain?

Every developed system of law has been confronted with the question: To what extent and for what purposes should the law recognize an equality between man and wife? The political aspect of this question is pertinent to the point at issue. Should the wife's political status be identified with that of her husband in personality and citizenship?[3] History tells us that the answer to this question has been determined by the institutions of the times.

In looking for the reason as a basis for the particular status of the wife, we need look to the social and political organization of the people. The children of Israel serve as an illustration of the early independent nations and tribes who had prohibitions against intermarriage with aliens. In such a case, there was no opportunity for the woman to acquire citizenship by marriage.

[1] 42 U. S. Stat. at L. 1021.

[2] Sir Robert Younger, in Report of the Select Committee on The Nationality of Married Women (1923), p. 167; Richard W. Flournoy, Jr., "The New Married Women's Citizenship Law," 33 Yale Law Jour. (Dec. 1923), 159,169.

[3] For the purposes of this article it will not be necessary to distinguish between citizen and national, citizenship and nationality. Any confusion in the meaning resulting from the connotation of these words as used on the Continent will thus be avoided. They will be used interchangeably.

A high sense of nationalistic spirit was fostered, thereby tending to bolster up the political organization.

The grouping of tribes represented a great change. Early Roman citizenship was held only by heads of households in their kin-organized institutions. A marriage under the *ius civile*, the early strict law, between members of different households, did not confer citizenship upon the wife. She had no separate status before the law. She came into the *potestas* of the head of the household of which her husband was a member. Under the *ius gentium*, during the period of equity and natural law, citizenship was extended by degrees until, at the time of Justinian, all the free subjects of the Roman Empire obtained the privilege. But marriage did not affect the citizenship of the wife; and an alien woman, after marriage, could acquire citizenship as though she were not married.[4]

In Northern Europe, the situation was similar to that of early Rome, but its evolution took a different course. In early German law, the woman had no independent status. She came into the *mund* of her husband[5] in a manner similar to the wife of a Roman coming into the *potestas* of the head of the household, as far as citizenship is concerned. The Canon Law recognized the principle of identity of husband and wife. The Common Law attitude has been termed the "submergence of the wife's legal individuality" into that of the husband.[6] Among the peoples of Europe during the middle ages, tribe and kin organization prevailed to a very large degree.

As intercourse between groups developed, the local laws and customs of the various sections of the country looked with less disfavor upon marriage with members of foreign groups. The community property régimes of Germany and northern France recognized the desirability of having community property, in which both spouses were interested, subject to the disposition of persons of one nationality. This would avoid inevitable confusion under circumstances where alien property was treated in a different manner than property of citizens. The importance of this consideration cannot be overestimated. Citizenship was extended to the wife upon marriage. This type of local law came to be incorporated into the Code Napoleon,[7] and later into other Continental codes.

Such a development was not the case in England. After the Norman conquest, with the land covered by aliens, few disabilities attached to them. When conditions later changed and English sovereigns ruled, a strong national spirit resulted. Blackstone tells us that British nationality could only be conferred by birth within the legiance of the Crown. One born under the

[4] It is well to note that Gaius, in commenting upon the citizenship of children, used various illustrations in which the citizenship of the mother differed from that of the father. Commentaries, I, secs. 90–92.

[5] Huebner, A History of Germanic Private Law (Philbrick translation, 1918), pp. 584–590.

[6] Maguire, "Suffrage and Married Women's Nationality," 54 Am. L. Rev. 641, 644.

[7] See Brissaud, *Manuel d'Histoire du Droit Privé* (1908), pp. 92, 108; Code Napoleon, Arts. 12 and 19.

protection of the Crown owed perpetual allegiance. No British subject could be discharged from the obligations and privileges imposed by birth, although he go to some far off country and stay an indefinite period. Marriage did not affect the citizenship of the wife. There was no naturalization except by special act of Parliament.[8]

This strict attitude gradually weakened during the period in which national interest was attracted to far away colonies and foreign lands. An alien wife came to be treated as a British subject if she lived in Great Britain. This particular step was given legislative sanction by the Naturalization Act of 1844.[9] Under the provisions of that act, an alien woman became naturalized upon marriage to a British subject. British protection was extended to a British woman who married an alien in all cases except during the time of her residence in the country of which her husband was a citizen. The privilege of expatriation, however, was not extended or recognized until 1870.[10] By the Statute of Naturalization Act of 1870, a British woman took the nationality of the country of which her husband was a subject at the time of marriage. Thus the rule in France and England came to be the same. It so continued until the change in the French Code in 1889.

The United States followed a course similar to that of Great Britain. There was much hesitation to recognize legally a natural claim to expatriation, both because of a strong national spirit developed by the Revolutionary War [11] and because of small population.[12] It was not until 1868, the year of the first of the Bancroft Treaties,[13] that a full privilege of expatriation was given by statute.[14] Its one limitation is its suspension while the country is at war.[15] Prior to 1855, the nationality of woman was not affected by her marriage.[16] By the law of that year,[17] an alien woman became an American citizen upon marriage to an American citizen.

The converse of this proposition, however, was in confusion until 1907.[18]

[8] Blackstone's Commentaries, Bk. 1, Chap. 10. See Memorandum prepared by the Home Office, British Parliamentary Papers, Cmd. 1988 (1923), Appendix VI, Part 3, Sec. 4. (Appendices to the Summary of the Proceedings of the Imperial Conference, 1923.)

[9] 7 & 8 Vict., Chap. 66, sec.16.

[10] 33 Vict., Chap. 14.

[11] Comments of Mr. Justice McKenna, Mackenzie *v.* Hare (1915), 239 U. S. 299; this JOURNAL, Vol. 10, p. 165.

[12] In a case refusing to recognize the privilege of expatriating oneself, it was said: "In countries so crowded with inhabitants that the means of subsistence are difficult to be obtained, it is reason and policy to permit emigration. But our policy is different, for our country is but sparsely settled and we have no inhabitants to spare." Williams Case (1799), Wharton State Trials, 652. Fed. Case No. 17708.

[13] Treaties recognizing a privilege of expatriation by foreign naturalization. See treaty with Germany (1868). 2 Malloy, Treaties, Conventions, etc. (1776–1909), pp. 1298–1299.

[14] 15 U. S. St. at L. 223.

[15] Act of March 2, 1907, sec. 2. 34 St. at L. 1228.

[16] Van Dyne, Citizenship; Shanks *v.* DuPont, 3 Pet. 242; Beck *v.* McGillis, 9 Barb. 35.

[17] Rev. Stat. 1994, 10 U. S. St. at L. 604 (Feb. 10, 1855).

[18] See Moore, International Arbitrations, pp. 2483–2506.

The act of March 2 of that year [19] provided "that any American woman who marries a *foreigner* [20] shall take the nationality of her husband." This act was construed by the United States Supreme Court in 1915 to mean that a wife became an alien upon marriage to an alien, even where the ceremony of marriage took place in the United States, and the matrimonial domicile was established and the parties continued to reside in the United States.[21] It has been thought that the distinction between an *alien* and a *foreigner* was lightly considered.[22]

The full realization that there was a statute so construed had a startling effect. It caused considerable comment and commotion.[23] Coming as it did during the war of 1914–18, it furnished an incentive to a reactionary attitude. It was not, however, the sole cause of the reaction. Previously, bills on the subject had been introduced in Congress. But it was one of the influences which occasioned increased public comment and interest. The new movement for the "emancipation of women" had its roots grounded in the hearts of a dozen live issues.

A recognition of the principle that citizenship is a high privilege, not to be easily lost or lightly acquired, need not in the least savor of reversion to the strict rule prohibiting expatriation. Such a prohibition respects an intense nationalistic spirit rather than the acceptance of reasons which have been recognized, though not generally, for about one hundred and fifty years, and which may justify a change in national allegiance.[24]

The paramount objection which has been raised to the "independent citizenship" proposition has a theoretical basis. It is contended that it will affect the family unity. The ties which unite husband and wife do not result from motives and desires of a political nature. Rarely does marriage result solely because the man is a member of a certain club, a certain church, a certain athletic organization, a certain political party, or a member of a certain political state. Marriage and citizenship are two institutions, separate and distinct. Never in the history of the world did they have less in common than they do today. Why link them together? It would be most cynical to suggest to a wife: you married him, you must well bear the effect of

[19] 34 U. S. St. at L. 1228.

[20] Italics our own.

[21] Mackenzie *v.* Hare (1915), 239 U. S. 299; this JOURNAL, Vol. 10, p. 165.

[22] See Wheaton's International Law (Lawrence ed.) p. 899; "In the United States it is incorrect to suppose that *alien*, as opposed to *citizen*, implies *foreigner*, as respects the country."

[23] See "Marriage *vs.* Votes," Cambell, 27 Am. Leg. N. 19; "Citizenship, Expatriation, Suffrage," note H. E. A., 4 Calif. L. Rev. 238; "Expatriation Resulting from Marriage to Alien Husband," W. W. S., 14 Mich. L. Rev. 233.

[24] For psychological attitude in nationality and individual choice, see Randall, "Nationality and Naturalization," 40 Law Quar. Rev. 18; also Oakesmith, Race and Nationality; Forbus, "The Nationality Law for the Wife," Legislative Counsellor (Feb. 1924, p. 6). 10 Henning, Va. St. at L., ch. 55, p. 129 (1779).

the remotest consequences of citizenship irrelevant as they may be to marriage.[25]

It has already been suggested that the customs and institutions of the times in the history of the world gave rise to the basis of laws concerning citizenship. Thus it was that the rule of *dependent* citizenship was able to fit upon the "simple facts of life and customs" [26] of the people among whom the rule flourished. Upon those facts was constructed a theory, which, through universal application, found its way into other branches of the law. Whenever the customs and nationalistic spirit change, there is always a tendency to retain the framework and the theoretical formulas upported by it. Whenever the formula appears to become inapplicable to certain instances, it is relaxed. In the last fifty years, relaxation in its application to civil relations has been astounding to holders of the orthodox view. But it is usually a necessary result of the changes in those "simple facts of life and customs" of the people. It has been mainly brought about through the change in the position of woman, and a feeling of common interests internationally. During the last century there has been evident the evolution of the principle that aliens should be on the same footing as subjects in all except political rights. The position of woman has changed. The privilege of expatriation is recognized. Intense nationalistic spirit has waned. The marriage institution is surrounded by civil rights. The political significance of the family organization has diminished. Consequently the unity of the family is more affected by a change in civil relations than in political. A particular form of institution, once conducive to family unity, should not be forced upon the marital status when conditions have so changed that it is a source of extreme hardship. The unity of the family does not depend upon political technicalities. If equal legal capacity is admitted in municipal law, it should equally hold true in the woman's choice of her international position.

The importance of a recognition of independent citizenship for women was greatly magnified during the war of 1914–18. Property rights had been identified with political status. Native-born citizens were put under the trying circumstances of having their property in the hands of the Alien Property Custodian. This came as the result of a marriage, possibly some twenty or thirty years before, to a German subject who had not perfected his American citizenship. So startling were some situations that Congressional action necessarily resulted in specific relief. The act of February 27, 1921,[27] provided for the release from the hands of the Alien Property Custodian, of certain property of American-born women whose status was tech-

[25] Compare Flournoy, "The New Married Women's Citizenship Law," 33 Yale Law Jour., pp. 159, 168, and Maguire, "Suffrage and Married Women's Nationality," 54 Am. Law Rev., pp. 641, 661.

[26] Flournoy, *op. cit.*

[27] 41 U. S. St. at L. 1147.

nically that of alien enemies by reason of marriage. The situation proved to be a strong argument for independent citizenship.

The adoption of the nineteenth constitutional amendment, giving equal suffrage to women,[28] extended the franchise to some ten million women. This increased the importance of citizenship. On the one hand, any foreign woman who had married an American citizen was allowed the franchise. The States of the Union were not prepared for this, and few of them had educational tests. Some opponents of the Cable Act favored such tests rather than independent citizenship. Then, on the other hand, the privilege of voting was denied to an American woman because she had married an alien, although she continued to reside in the United States. The effect of this situation cannot be overestimated. Every women's organization with sufficient political influence sensed the condition. A solution in "independent citizenship for women" seemed inevitable.

From appearances, the movement for equality between the sexes will continue to advance. It may be noted that at the present time efforts are being centered upon the adoption of a constitutional amendment providing: Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.[29] This at least expresses a sentiment favoring the equality of the status of the sexes. We may truly regard equality of citizenship choice a step forward in this movement.

As touching upon family law, civil rights have been revolutionized since the days of the strict common law. One has only to look back upon the power of the husband to chastise the wife, the presumption that the husband is responsible for a crime committed by his wife in his presence, her ineligibility to contract, and the limited extent of her rights of ownership. Constantly since then a development slow and sure has progressed upon the principle of equality of rights for the two sexes. In England the change has come about largely within the last fifty years. The Married Women's Property Act, 1882, Naturalization Act of 1914–18, Sex Disqualification Removal Act, 1919, are a few of the steps taken. Likewise, in the United States, property and contract rights of the wife have been undergoing severe change.[30] The situation of the economic independence of women has tended to aggravate this change. It has been recognized as a necessary one. The argument concerning family unity may well be directed toward developments in the field of civil rights. But what effect would it have to stem the tide?

Such a revolution in civil rights could not be effected without a similar tendency in political rights.

[28] 1920, 41 St. at L. 1823.

[29] S. J. Res. 21 by Mr. Curtis (Dec. 10, 1923), 68th Cong. 1st Sess. Sponsored by National Women's Party (letter to C. D. Hill, Feb. 6, 1924).

[30] Upon this subject see "Current Legislation, Equalizing the Status of the Sexes," 21 Colum. Law Rev. 712.

The Americanization Study [31] addressed to all of the judges having jurisdiction of naturalization cases in the United States an inquiry consisting of two questions:

First. Would you favor legislation to permit the naturalization of a married woman in her own name, if personally acceptable, regardless of the alienage of her husband, or his failure to obtain or refusal to see naturalization?

Second. Would you favor reserving to a native-born American woman, if she desired it, the American citizenship which, under the present law, she sacrifices by marriage to a foreigner?

About two-thirds of the replies to each question were answered in the affirmative. The replies contained many suggestions of interest from one extreme view-point to the other. It is clear, however, that the preponderating view was in favor of a radical change in policy favoring independent citizenship.[32]

A possibility of citizenship independent of marriage was partially recognized by the French law in 1889. A French woman, by a law of that year, loses her French nationality upon marriage to an alien, *unless* by the law of her husband's country she does not gain his nationality. A similar provision has been adopted by Belgium, Bulgaria, China, Italy, Mexico, Monaco, Portugal, Siam, and Venezuela.[33]

Prior to the decision of Mackenzie *v.* Hare, 1915,[34] there had been presented in Congress several bills evidencing interest in legislative action on the subject and later the consequences of the rigid rules respecting property

[31] A study carried out under the direction of Mr. Allen T. Burns, reported in eleven volumes. The studies were prepared through funds furnished by the Carnegie Corporation of New York. Letter of Mr. Burns to C. D. Hill, March 4, 1924.

[32] J. P. Gavit, Americans by Choice (1922), pp. 315–317. Letter from Mr. Burns to C. D. Hill, March 4, 1924.

[33] 49 *Journal du Droit International* (Clunet), 1922, pp. 619–620, citing:

France: C. civ., Art. 19, modified by the law of June 26, 1889.

Belgium: *Loi sur l'acquisition et la perte de la nationalité* (June 8, 1909), Art. 11, *Monit. du 17 juin* 1909; *Pasinomie*, 8 *juin* 1909, No. 137, p. 112. [See also law of May 15, 1922.]

Bulgaria: Law of Dec. 4, 1903; law of Jan. 10, 1908, Art. 16.

China: Law of Nov. 18, 1912, Art. 12a. [See also revised law of nationality, Dec. 30, 1914.]

Italy: Law of June 13, 1912, Art. 10.

Mexico: Law of May 28, 1886, Art. 2, sec. 4.

Monaco: Law of June 26, 1900.

Portugal: C. civ., Art. 22, sec. 4.

Siam: Law of April 10, 1913, Art. 4.

Venezuela: C. civ. of 1916, Art. 22.

See also, *loc. cit.*, Costa Rica, laws of 1886–1889, Art. 4, sec. 5; Nicaragua, law of Oct. 3, 1894, Art. 2; Salvador, law on foreigners of 1886, Art. 3; Serbia, C. civ., Art. 48, providing that a Serbian woman who marries an alien loses Serbian nationality if by the laws of the country of her husband a woman would lose her nationality by marriage to a Serbian.

Swiss citizenship is not lost except by explicit renunciation before the competent Cantonal authorities.

[34] 239 U. S. 299; this JOURNAL, Vol. 10, p. 165.

rights of aliens during the war caused the introduction of a number of bills to relieve the grave situations which presented themselves. None of the bills were ever reported from the committees to which they were referred. It was not until 1922 that definite action was taken.

The purpose of the Act of September 22, 1922, has been stated. It provides that any woman who is eligible to citizenship who marries an American citizen, or whose husband becomes naturalized as a citizen of the United States, shall not become a citizen because of the marriage or naturalization. She may, however, become separately naturalized in accordance with the naturalization laws, with the exception that no declaration of intention is required, and she need reside in the United States only one year immediately prior to the time of filing her petition. A woman citizen of the United States does not cease to be a citizen by reason of her marriage to an alien, unless she makes a formal renunciation before a court having jurisdiction over the naturalization of aliens, or if she marries an alien ineligible to citizenship. In case she resides after marriage, for two continuous years in a foreign state of which her husband is a citizen or subject, or for five years outside of the United States, she is subject to the same presumptions as a naturalized citizen.[35] If, at the termination of the marital status, she is an American citizen, she retains her citizenship regardless of her residence. Women who acquired their citizenship by marriage before the passage of the act retain their citizenship. Those who had lost it may become naturalized as suggested for alien wives of American citizens. No certificate of arrival, however, is required. Appropriate sections of the Revised Statutes and the Expatriation Law of 1907 were repealed.[36]

Thus was acquired a form of "independent citizenship for women" in the United States. It is interesting to note that this nominal independence of citizenship does not mean equality of citizenship. In fact several points of inequality of citizenship rights between man and wife exist.

If an American citizen marries a woman ineligible to citizenship, he retains his American citizenship. But if an American woman marries an alien who is ineligible to citizenship, she loses her American citizenship. This situation was mentioned in Congress before the passage of the act, but it met with no serious criticism.[37] It may be that in such a case, it is well to consider the fact that it is still usually recognized to be the custom and the proper thing for the husband to furnish the home and to carry the economic burden. The wife usually follows the husband in such efforts. It is also well to note that an alien who marries an American woman must still fulfill the five-year requirement of residence before naturalization; while an alien woman after marriage to an American citizen requires only one year. If an American

[35] "It shall be presumed that he has ceased to be an American citizen." Act of March 2, 1907, sec. 2; 34 U. S. St. at L. 1228.

[36] Rev. Stat., sec. 1994, and secs. 3 and 4 of Act of March 2, 1907, 34 U. S. St. at L. 1228.

[37] 62 Cong. Rec. 9057, June 20, 1920.

woman, after marriage to an alien, remains abroad, she is followed by the same presumptions as an alien who has been naturalized. Such is not the case with an American man. These may be considered the most striking differences.

The possibility of hardship arising under the new law was by no means made impossible. Several classes of serious difficulties have become quite apparent. "Statelessness"—lack of citizenship—results in many cases. As previously stated under the citizenship laws of some countries, a woman *retains* her citizenship *if* she does not acquire the citizenship of her husband upon marriage by virtue of the foreign law. But the following twenty-four countries have citizenship laws under the provisions of which a woman who marries a foreigner loses her own citizenship and acquires that of her husband: Austria, Brazil, Bolivia, Canada, Cuba, Denmark, Dominican Republic, Germany, Great Britain, Greece, Guatemala, Haiti, Holland, Hungary, Japan, Luxemburg, Norway, Peru, Persia, Poland, Roumania, Spain, Sweden, Turkey.[38] If her husband be an American citizen and the marriage occurred since September 22, 1922, she would become stateless in every case, for by the law of that date she does not acquire American citizenship by marriage. No country can by legislation give a woman citizenship in another country. She must first become naturalized. This process requires at least one year of continuous residence within the United States, Hawaii, Alaska, or Porto Rico, immediately preceding the filing of her petition.

(a) Thus, a British woman, upon marriage to an American in England

[38] 49 *Journal du Droit International* (Clunet), 1922, pp. 618–619, citing:
Austria: C. civ., Art. 32.
Brazil: Law of Sept. 10, 1860.
Bolivia: C. civ., Art. 11.
Canada: Law of July 7, 1919, Art. 11.
Cuba: C. civ. espagnol, Art. 22.
Denmark: Law of March 29, 1898, Art. 6.
Dominican Republic: C. civ., Art. 19.
Germany: Law of July 22, 1913, Art. 17–6e.
Great Britain: Law of Aug. 7, 1914, Art. 10.
Greece: C. civ., Art. 25.
Guatemala: C. civ., Art., 56.
Haiti: Law of Aug. 30, 1907, doct. 9.
Holland: Law of Dec. 12, 1892, Art. 5.
Hungary: Law of Dec. 20–24, 1879, Art. 34.
Japan: Law No. 27, March 15, 1916, Art. 18.
Luxemburg: C. Nap., Art. 19.
Norway: Law of April 21, 1888, Art. 2b.
Peru: C. civ., Art., 41.
Persia: Law of Aug. 7, 1894, Art. 11.
Poland: Law of Jan. 20, 1920.
Roumania: C. civ., Art. 12.
Spain: C. civ., Art. 22.
Sweden: Law of Oct. 1, 1894, Art. 6.
Turkey: Law of Jan. 7, 1869, Art. 7.

becomes stateless and is entitled to no passport to enter the United States. She may enter as an immigrant or upon special parole in certain cases when the quota is full. This is an obvious disadvantage to a wife entering the United States for the purpose of becoming naturalized.

(b) Being entitled to no passport from either the United States or Great Britain, she would have the official protection of neither government while abroad. Thus, it would be inadvisable for her to go even with her husband, to visit abroad, to engage in missionary work, to take part in a commercial enterprise, or to accompany him even when he is an accredited official in the service of the United States Government. A permit to leave the United States or reenter, or a traveling certificate [39] does not lend governmental protection abroad. In case of insurrection, the American Government would make provision only for his protection. She would have the protection of no foreign government.

(c) Other cases arise which have an effect similar to that in (a). Suppose a British man and wife come to the United States. He proceeds to become naturalized. Prior to September 22, 1922, there was no necessity for her to do so. But since that date she returns to England for a short visit, during which time he becomes fully naturalized. She is immediately stateless, as in case the marriage occurred in England or America since the passage of the act.

Why should marriage, an institution very slightly connected with citizenship, carry with it such disastrous results? Surely statelessness is not one of the natural risks or disadvantages of becoming married. Nevertheless, a woman, under the present law, attempting through marriage to become a divinely sanctioned helpmeet to her husband who is an American citizen, is thereby rendered *stateless, a most unfortunate situation for the wife of an American citizen.*

It has been thought by some that these classes of cases would be remedied as they became apparent, or by changes in the laws of foreign countries, or by an international convention. The last suggestion has not received sufficient recognition at present, although it is being considered by a Congressional committee, and is being strongly advocated by various women's organizations and international associations. If attempts to change the laws of other countries to fit our present law, and thus avoid statelessness, meet with the same disastrous results as they have in England in the last two years, we cannot depend for immediate relief upon that suggestion. We must remedy our own local situations wherever they produce gross injustices. We created them. We must arrange to eliminate them. Equality of citizenship rights does not suggest statelessness. Surely it condemns it. A law covering these classes of cases would safeguard against the rupture, if any, in family unity caused as the result of statelessness. It must be noted that this

[39] Traveling passes are issued by the British Government; Sweden issues a "Passintyg"; in Germany, it is a "Personalausweis."

situation did not result from the attempt of the Cable Act to equalize the privileges of citizenship, but because it was not inclusive enough in respect to the situations arising under the conflict of American and foreign laws. It has been suggested that the United States issue passports to stateless wives of American citizens.[40] It seems that this would eliminate the immediate difficulties arising under these classes of cases.

There is another very important group of cases to which the previous discussion would also apply. Either an American citizen or his alien wife may be in such a position that it is necessary to remain abroad. It may be most inconvenient for the wife to retire to America for the one year requirement. This situation might occur to an employee of the government, a representative of an American business concern, a missionary,[41] a teacher, a student, or any other person in a representative or individual capacity. Should there not be some other way for the wife to become naturalized? It is possible for this situation to be remedied by an act waiving the declaration and resident requirement, and arranging for the proceedings to take place before a governmental agent if abroad. An act might require only an oath of allegiance.

The third situation and the most common, is the case of an alien spouse of an American citizen who must come to the United States as an immigrant. This matters not whether he or she has lost previous citizenship. By marriage to an American citizen a Belgian woman would not lose her Belgian nationality. She would come to America only as an immigrant. Likewise a stateless woman. The British husband of an American must come as an immigrant. This was true prior to the Cable Act. But now, since one spouse enters freely, separation may result. A solution to this situation would be to admit the husband or wife of an American citizen as a non-quota immigrant, or mandatorily without immigration restrictions.[42]

"Women ineligible to citizenship" were known prior to the Cable Act. "Wives ineligible to citizenship" are a creation of that act. The granting of passports might relieve the more immediate difficulties, but only abolition of this status would eradicate the fundamental difficulties inherent within it.

It may well be noted that in the United States, as elsewhere, civil rights have been identified with citizenship status. The Federal Homestead Law provides for settlement upon Federal land by citizens. It has been suggested that especially in border States does a difficulty here arise. A naturalized Mexican dies leaving a "simple Mexican peon woman, whose primitive back-

[40] Hearings before the Committee on Immigration and Naturalization on H. R. 6073, Feb. 12, 1924, p. 20. Also incorporated in letter of Feb. 23, 1924, from Congressman Tinkham to Congressman Porter, chairman Committee on Foreign Affairs, in support of the proposed Act, *id.*, p. 23. Reeves, "Nationality of Married Women," this JOURNAL, Vol. 17, p. 97.

[41] Facts in case of Rev. and Mrs. Jules Ryff filed with House Committee on Immigration and Naturalization, Feb. 23, 1924. Such a situation is also disclosed by the introduction of H. J. Res. 132 by Mr. Kelly, Jan. 9, 1924, 65 Cong. Rec. 775. "Joint resolution admitting Edith Thomas to the character and privileges of a citizen of the United States."

[42] See Act of May 26, 1924, secs. 4 (a) and 6 (a).

ground makes the process of naturalization almost impossible."[43] In many States the laws relating to mothers' pensions provide only for citizens. Similarly, workmen's compensation laws reduce the amount allowed to aliens. Municipal employment, so often extended to widows of former employes, bars aliens in many places. In like manner, difficulties arise in community property, inheritance, taxation, granting of rights of action, and in many other ways. "In a question of separation, financial transaction, divorce and custody of children, the wife's case against the husband is that of an alien against an American citizen."[44]

Other considerations are also worthy of note. A failure of the women to become naturalized will result in fewer citizens. It is more difficult for an immigrant woman to become educated or to attend naturalization classes. She is so closely attached to her home and children. She has a natural aversion to official procedure. On the other hand, the husband's associations give him an opportunity to learn and become acquainted with the new government of his choice. Such an alien woman will not encourage her husband to become naturalized, for she would feel that she could not follow. The attitude of the husband might well be that he owes it to his wife not to become naturalized. On the other hand, it has been suggested that citizenship means more to an alien woman when separately given. It has resulted in the extension of women's schools. Efforts might be made to carry the educational process into the homes. Statistics showing increases in naturalizations since September, 1922, should not be compared with statistics previous to that time without considering the fact that alien wives must now become naturalized. This is a serious difficulty, and as time goes on it will tend to restrict immigration. Statistics will show that fewer aliens are being absorbed into the ranks of citizenship.

Difficulties arise under the immigration rules.[45] Previously a wife of a naturalized American citizen was admitted although she was suffering from some disease which was curable. Now she is treated as other aliens. In case of sickness, her husband may be unable to care for her in a private institution. If she thereby becomes a public charge, she is faced with deportation.

The suggestion that there will be difficulty in handling the increased number of naturalization cases is of small relative consequence.

At the present time, the problem of dual nationality—citizenship in two countries—does not appear serious. Many treaty agreements eliminate the possibility of such a situation in many cases. The difficult situations of the past involving dual nationality arose in respect to the military service requirement in some countries. But it has not affected women. Consequent-

[43] Foreign Language Information Service, Editorial Committee, "Women Without a Country," Release no. 38, Oct. 8, 1923.

[44] Statement issued by New York Women's Trade Union League.

[45] See "What is the Cable Act?" Razovsky, in The Immigrant, Oct., 1922.

ly, it is hard to see why it would be improper for them to place themselves under the protection of two countries. Benefits accumulate to a woman who has dual or multi-nationality. Such relations are and should be regulated by international agreement.

It has become quite obvious that the problem of the nationality of married women has assumed an international rôle which exceeds in importance the circumstances attached to the change in the French Civil Code in 1889. It may be possible that the legislative powers of the world will follow the lead of Congress as they did the action of the commission which drafted the French Code of 1804. Increasing interest has been evidenced in the legislation of Belgium, Bulgaria, China, Italy, Mexico, Monaco, Portugal, Siam, and Venezuela,[46] providing for loss of citizenship by the wife upon marriage to an alien, unless the nationality of the husband is not acquired.

By the British law of 1914,[47] the wife of a British subject is deemed to be British, and the wife of an alien to be alien, but if a British husband of a British subject ceases to be a subject during the continuance of the marriage, the wife may elect to retain her nationality. The statute passed in 1918 allows a woman of English birth, after obtaining permission from the Secretary of State, to resume her British nationality in case she had lost it.[48]

On March 8, 1923, the House of Commons passed a resolution favoring the appointment of a select committee to meet with a committee of the House of Lords to investigate the subject of the nationality of married women.[49] This plan was approved by the House of Lords, and the resulting committee, after two months of inquiry, failed to advise any change in the existing laws.[50] It was equally divided in opinion.

At the Imperial Conference of 1923,[51] the Commonwealth of Australia Government proposed an amendment of the Imperial nationality law in respect to the nationality of British-born women married to aliens. The advisability of a change in the present rule that "a British woman becomes an alien on her marriage to an alien, and there is no power to naturalize her during the continuance of the marriage," was suggested. It was noted that the wife's loss of British nationality tended to give rise to hardship in cases where the wife was deserted by her husband or separated from him. The committee of the conference seriously considered the cases of hardship mentioned by the proponents of the change. So also were the arguments presented in the Houses by the two draft reports prepared by members of the select committee. The committee of the conference were of the opinion,

[46] See note 33.

[47] 4 and 5 Geo. V, c. 17, sec. 10.

[48] 8 and 9 Geo. V, c. 38, sec. 2 (5).

[49] Parliamentary Debates, Commons, vol. 161, p. 897.

[50] Report by the Select Committee, The Nationality of Married Women, July 24, 1923.

[51] Session Oct. 1 to Nov. 8, 1923. Imperial Conference, 1923, Summary of Proceedings, Cmd. 1987 (November, 1923). Appendices in Cmd. 1988.

however, that the principle of assumption of the husband's nationality by the wife should be maintained.[52] The report of the committee was approved by the conference.[53]

The National Council of French Women proposed substitutes for Articles 12 and 19 of the code.[54] The effect of the change would be similar to the Cable Act,[55] but retaining the feature of the present French law preventing statelessness. During April, 1923, a bill of similar purport was introduced in the French Senate, but failed to pass.

It is reported that in 1920, the International Council of Women at their meeting in Copenhagen passed a resolution expressing the belief of women of many countries that the citizenship of married women should be upon an independent basis.

The International Law Association has been interested in the situation. In 1922, the Association met in Buenos Aires, and after discussion on the subject, unanimously carried the following motion:

> The Conference, without going further into the extension, which may be very desirable, of the rights of women, a question which comes within the scope of the internal legislation of each country, is of opinion that it would be desirable to fix uniformly by treaty the nationality of married women, reserving to a married woman, as far as possible, the right to choose her own nationality.[56]

In 1923, a conference of the Association was held in London. It adopted a proposal by Dr. E. J. Schuster to the effect that no adult person should automatically have to submit to a change of nationality. At the same conference there was explained a provisional draft international convention put forward by the International Woman Suffrage Alliance, founded in 1904, with headquarters in London. It was first proposed at the meeting of the Alliance at

[52] Resolution: The Committee are of opinion that the principle of the existing law that the nationality of a married woman depends on that of her husband should be maintained. They nevertheless recommend that power should be taken to readmit a woman to British nationality in cases where the married state, though subsisting in law has to all practical purposes come to an end.

[53] The subject in its various aspects within and without the British Empire which was considered, is dealt with in a memorandum prepared by the Home Office. See Appendix VI, Part 3 of Cmd. 1988.

[54] See Report of the Thirty-first Conference, The International Law Association, p. 247.

[55] The proposed substitutes suggested by The National Council of French Women:

Art. 12—L'étrangère qui épouse un Français conserve sa nationalité; elle n'acquiert la nationalité française que sur sa demande expresse de naturalisation sur laquelle il sera statué par décret et après enquête.

Art. 19—La femme française qui épouse un étranger conserve sa nationalité à moins qu'elle ne déclare expressément dans son acte de mariage vouloir acquérir la nationalité de son mari. Même dans ce cas elle reste Française si dans la législation étrangère son mariage ne doit pas lui conférer la nationalité de son mari.

[56] Report of the Thirty-first Conference, Aug. 24–30, 1922, Vol. 1, pp. 247–251, 255–257.

Rome in 1923, and provides for citizenship independent of marriage or naturalization of the husband.[57]

[57] Provisional Draft International Convention suggested by the International Woman Suffrage Alliance:

Preamble. The high contracting parties (here name the states signatory to the convention) recognizing the undesirability of treating as of little importance the privileges and responsibilities of nationality by imposing upon married women a nationality without their consent, and further desiring as far as possible to prevent the hardships arising from conflicts of law, hereby resolve to adopt, each in their own state, legislation on the nationality of married women, as indicated in the following general principles and particular applications thereof.

I. General Principles

(a) Effect of Marriage: The nationality of a woman shall not be changed by reason only of (i) Marriage, or (ii) A change during marriage in the nationality of her husband.

(b) Retention or change: The right of a woman to retain her nationality or to change it by naturalization, denationalization, or denaturalization shall not be denied or abridged because she is a married woman.

(c) Absence of consent: The nationality of a married woman shall not be changed without her consent except under conditions which would cause a change in the nationality of a man without his consent.

II. Particular Application

(a) Retention of nationality: A woman shall not lose her nationality by reason only: (i) That she marries a foreigner, or (ii) That during marriage her husband loses his nationality by naturalizing in another country or otherwise.

(b) Loss of nationality: A married woman shall lose her nationality only: (i) Under the conditions which cause a married man to lose his nationality, or (ii) If she on marriage or during marriage is deemed by the laws of the state of which her husband is a national, to have acquired his nationality and she makes a declaration of alienage.

(c) Acquisition of nationality: (i) A foreign woman shall not by reason of marriage only, acquire the nationality of her husband. (ii) A wife shall not by reason only of her husband's naturalization be naturalized. (iii) A married woman shall be naturalized under the conditions which naturalizes a married man. (iv) Special facilities shall be given to a woman to acquire the nationality of her husband, and special facilities may be given to a man to acquire the nationality of his wife.

(d) Reacquisition of nationality: A married woman who has lost her nationality to acquire that of her husband shall on the dissolution of the marriage by death or divorce be given special facilities to reacquire her own nationality if she returns to her own country.

(e) Retrospective provisions: (i) Loss of nationality by or through marriage—where before the adoption of the legislation based on this convention a woman has lost her nationality by reason only (1) that she married a foreigner, or (2) that during marriage her husband changed his nationality, she shall after the adoption of such legislation reacquire her nationality, if she makes a declaration to this effect; (ii) Acquisition of nationality by or through marriage—where before the adoption of legislation based on this convention a woman by marriage or by the naturalization of her husband acquired his nationality she shall retain it unless she makes a formal declaration of alienage.

(f) Protection for the stateless woman: If a woman by the laws of her own state should by marriage lose her nationality, she shall be entitled to a passport and to protection from her husband's state.

(g) Additional article applicable only to states where the rights and duties of spouses in personal relations and as regards their property depend on nationality: In marriages which

On March 17, 1924, the author of the Cable Act introduced into the House of Representatives of the United States Congress a resolution which would authorize the President to call a conference of the governments of the world to adopt a convention on the nationality of married women, embodying the principle that a married woman should be given the same right as a man to retain or change her nationality.[58]

Thus we see that the international situation is sensed and is being considered by many agencies, home and foreign legislative bodies, by national and international associations, and by many individuals.

One or two considerations might be noted before closing. Because of the fact that civil rights are so affected by political status, a new position in the latter will affect the former, causing confusion. There is a question whether it would be a good thing to give equal civil rights to all women in all the world. How it would revolutionize their social and economic status in many countries! Would their ability to change their customs, habits, educational training and laws be equal to such a change? Surely it seems inadvisable at the present time that women of every country, under present conditions, should be given independent citizenship. People generally have come to take it as a matter of course, because of the former law, that a woman takes the nationality of her husband. Many women have expected that as a consequence of marriage. Under the present situation, how much of a legal formality should the wife be compelled to undergo before acquiring the citizenship of her husband? Surely it is not conceivable that she should wait the five year period required for others. Is it best for her to wait even a year? From the other angle, a husband must wait five years in the United States. Why not allow the alien husband of an American citizen the same privilege as the alien wife of an American citizen. In other words, should an alien husband of an American citizen be compelled to wait the now required five years? It is a question whether the husband and wife should be put on an equal footing, or whether the husband should in this respect lead the way for the wife. "If two ride a horse, one must ride in front."[59] Otherwise it may well be suggested: to what purpose does the wife take the husband's name? Should she be allowed to take it in vain? Immediately upon marriage, it should be possible for her to become naturalized, or for the hus-

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take place after the adoption of legislation based on this convention, the rights and duties of spouses in their personal relations and as regards their property shall be dependent on the law of the nationality of either the husband or the wife, at the time of their marriage, as they shall both agree at that time. But there shall be no change in the law of marriages which took place before.

III. Renunciation

The convention shall remain in force for five years and unless renounced shall be tacitly renewed every five years.

[58] H. J. Res. 219 by Mr. Cable, March 17, 1924; 65 Cong. Rec. 4520.

[59] Report of the Select Committee, The Nationality of Married Women, p. xiii.

band to acquire her nationality. If the parties so wish, it should be possible for both to be of the same nationality.

The independent attitude of the United States has created wide gaps which should be filled by appropriate legislation. The international confusion resulting from granting independent citizenship to the women of one country has been compared to burning the house to roast the pig. A matter assuming so vital a rôle in international affairs deserves the sincere consideration of an international tribunal or conference.

THE QUOTA PROVISIONS OF THE IMMIGRATION ACT OF 1924

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The Immigration Act of 1924 is a novel piece of legislation in two respects.[1] In it, for the first time, is a real attempt made to control immigration, measurably at least, at its source, and thus to reduce to a minimum the hardships and inhumanities that heretofore have prevailed to such an extent as almost to be regarded as a matter of course. And in it, for the first time also, are immigration and eligibility to citizenship recognized as related subjects, and ineligibility to become naturalized made a reason for the exclusion of aliens.[2] While it is by far the most drastic immigration statute ever passed by the United States Congress, it is in numerous respects the most humane measure yet devised.

The regulation of immigration by fixing quotas for foreign countries and then excluding all aliens born in those countries applying in excess of such quotas was tried for the first time in the Quota Act of 1921,[3] which expired by limitation on June 30, 1924, and was at once superseded by the new Quota Act. When the 1921 act was passed the plan was regarded by all as highly experimental; indeed, at that time it was stated quite generally that its use was a temporary expedient only, intended to give the country a "breathing spell" and to allow Congress time in which to work out a "scientific" method of immigration control. Although many difficulties were encountered and great hardships and embarrassments arose in connection with the enforcement of that act, the idea of excluding by the quota method steadily grew in favor. And when Congress came to adopt "a more scientific" measure, that plan (very materially modified, however) was retained, evidently being regarded as the best method available.

1. *The main objects* of the new, as of the old, quota law are: first, a sufficient reduction in the volume of immigration to give assurance that the country will not admit more annually than it can accommodate; and, second, making the reduction fall most heavily on the "new immigration" countries (of southern and eastern Europe), and most lightly on those

[1] The act is published in the Supplement to this issue of the Journal, pp. 208. Therefore it is usually possible, in the interest of brevity, to avoid quoting, and simply to refer to, its various provisions.

[2] An article by the author with respect to the provisions of the new law excluding aliens ineligible to citizenship, will appear in a future number of the Journal.

[3] Approved May 19, 1921, 42 Stat. L., 5; extended by Public Resolution No. 55 approved May 11, 1922, 42 Stat. L. 540.

countries (of western and northern Europe) from which our earlier immigration was principally derived—this in order to give assurance of the more rapid assimilation of those admitted. These, judging from the law itself and its "legislative history," are the theories upon which Congress proceeded when formulating the measure.[4]

2. *The humane purposes* of this legislation and the necessity for amending the law in such manner as to effect those purposes may be thus described: both the general immigration statute and the quota act superseded by the new law had been found in practice to produce many hardships, some of which were of a heart-rending character. Moreover, the enforcement of the 1921 Quota Act often resulted in absurd consequences. The most severe hardships arising under the two laws consisted of the separation at United States ports of the immediate members of families. And under the Quota Act of 1921, with the competition which arose, on the part both of the immigrant-carrying vessels and the immigrants, to reach United States ports and apply for admission before a quota for a certain month had been exhausted, thousands of aliens were transported to this country only to find that others, embarking somewhat earlier than they, or traveling on vessels faster than theirs, had beaten them to the goal, and that they would have to return to their homes, which had often been broken up when the "mad rush" for America began. The ridiculous spectacle was repeated again and again at New York of vessels racing each other into port in order that their passengers might get the preference under the quotas and their owners or masters escape the penalties imposed for bringing aliens in excess of the numbers allowed by the law.[5]

The experience with the previous laws, that with the 1921 Quota Act particularly, seems to have convinced the Congress that something must be done toward transferring the inspection of aliens to the sources of our immigration, and that the methods of determining the quotas and the "machinery" for keeping account of those filling up the quotas must be so improved as to stop the competition just described and the ridiculous and dangerous results thereof.

Under the 1921 act "a troublesome difficulty" was "the enforcement of the numerical limitation," as that act required the "actual physical counting of human beings arriving by ship," which was "a task of magnitude," leading to mistakes, the racing of ships into ports, delays, disappointments, and hardships, and "distressing appeals for relief in individual cases."[6] So Congress determined that the new law should contemplate the counting of "certificates (visas), not persons"; that the law should provide "for enforcement of the numerical limitation not by counting immigrants upon

[4] See H. Rep. 350, 68th Cong., 1st sess., pp. 12–14.

[5] See H. Rep. 350, 68th Cong., 1st sess., p. 12, and *Congressional Record*, Vol. 65, Part 6, p. 5465.

[6] H. Rep. 350, 68th Cong., 1st sess., p. 12.

their arrival, but by counting 'immigration certificates' [7] issuable at American consulates overseas." [8] And it was also provided, in connection with the visa system discussed hereinafter, that the consuls should not issue a visa to any immigrant if it should appear to him from the evidence presented that such immigrant was a member of any class excluded by the immigration laws.

Aside from these general provisions intended and calculated to reduce the hardships and inhumanities of immigration control, Congress has made a number of exceptions to the law exempting certain classes of aliens from its operation, some of which have the humane object of preventing the separation of families. These are discussed below under the headings "Classes exempted" and "Preferences." Moreover, the difficulties which had arisen under the old law from the fact that, nationality being determined rigidly by place of birth, immigrant families would sometimes apply some members of which were of one and some of another nationality and for some of whom a quota would be open while for others none would be available, were overcome in the new law by specifying exceptions to the method of determining nationality—discussed hereinafter under the heading "How nationality is determined."

3. *How quotas are determined.* The new law effects drastic changes in this regard. Under the 1921 act the "quota base" was the census of 1910, and the number of admissions allowed to any nationality annually was three per centum of the number of foreign-born shown by that census to be in the United States. The new law makes the "quota base" the census of 1890, and the percentage two, with a proviso that the minimum quota for any nationality shall be 100. The quota so calculated is to remain in force until June 30, 1927. On July 1, 1927, an arrangement, known as the "national origins" plan, is to come into operation. Under it "the annual quota of any nationality" will be "a number which bears the same ratio to 150,000 as the number of inhabitants in continental United States in 1920 having that national origin . . . bears to the number of inhabitants in continental United States in 1920, but the minimum quota of any nationality shall be 100." [9]

The manner of calculating the quotas under the two per centum plan is specified with great care and particularity in subdivisions (b), (c), (d), and (e) of Section 12 of the act, captioned "Nationality," while that of calculating them under the "national origins" plan is specified with equal clearness in subdivisions (c), (d), and (e) of Section 11, captioned "Numerical Limitations." No good purpose could be served here by repeating those specifications.

[7] These when the House and Senate bills were finally merged and enacted into law were called "visas," not "certificates."

[8] H. Rep. 350, 68th Cong., 1st sess., pp. 1 and 12.

[9] Subd. (b), Sec. 11.

4. *The "national origins" plan*, being entirely new, and the claim being made for it that, instead of arbitrarily reducing the volume of immigration, in general, or from certain countries, it is a scientific plan for keeping America American, it is well worth while to give a brief synopsis of the lengthy and painstaking description of it furnished to the Senate by its proponent, Senator Reed of Pennsylvania, with a reference to the record where those interested may go into the details if they please.[10]

The principle upon which the "national origins" plan runs is this: The real assimilation of aliens depends to a very large extent upon their associates after entering—"we can easily assimilate" them "if their origins resemble the origins of the people they find when they get here." The fixing of the quotas by allowing a certain percentage of the number of a certain nationality here to come in annually is artificial and (while not discriminatory in the racial sense for which such system is generally criticized) is discriminatory in that it fails to take into account the origins of our *native-born* population; and, if our racial stock is to be preserved in approximately its present condition, a sound policy demands that calculations with respect to the numbers of the various nationalities to be, from time to time, admitted shall be based upon a determination of the national (or racial) origins of *all* the people here with whom the new arrivals are to intermingle and intermarry.

This is, indeed, a scientific method of determining quotas, if it is feasible to make even approximately correct calculations of the kind contemplated. And there would seem to be little real ground for doubting its feasibility.

5. *How nationality is determined.* The 1921 act provided simply that "nationality shall be determined by country of birth, treating as separate countries the colonies or dependencies for which separate enumeration was made in the United States census of 1910." The new law, under the caption "Nationality,"[11] repeats this provision, inserting after the word "dependencies" the words "or self-governing dominions," and changing "census of 1910" to "census of 1890," and then adds two very important exceptions. As these provisions originated with the House committee, the best explanation of them doubtless is that given by the committee, as follows:

> The question of nationality is of importance in the enforcement of a numerical limitation. Since the enactment of the 3 per cent law some perplexing problems have been presented by reason of different nationalities represented in the same family; by reason of changes of allegiances; and by reason of doubt as to places of birth.
>
> On the whole, the committee believes that determination of nationality by country of birth, while not always just or equitable, is the most satisfactory principle upon which to base the quotas. No other feasible principle has been evolved.

[10] *Congressional Record*, Vol. 65, Part 6, pp. 5460 *et seq.* See also *id.*, Part 6, pp. 5942–5945, and *id.*, Part 7, p. 6457.

[11] Subd. (a), Sec. 12.

> The bill makes two important departures from the birth-nationality principle: First, the nationality of a minor child is fixed as that of its accompanying parent; second, if the nationality of a wife is different from that of her husband and if the quota for her nationality is filled, she shall be counted as of the husband's nationality, but without increasing the quota for his nationality.[12]

6. *The visa system.* The engrafting of this system upon the quota plan is one of the most important improvements effected by the new law. The plan originated with the House Committee on Immigration. As the provisions [13] covering it were drawn by the committee, however, it contemplated that the visa should be placed upon immigrants' passports, that a certificate separate and distinct from the passport should be issued to aliens within the quota and not shown to be members of the otherwise excluded classes, and that a questionnaire should be used for the procurement of information from aliens applying for the certificate.[14] But the Senate committee devised a plan, intended to accomplish exactly the same objects, which was eventually adopted when the bills went before the conference committee of the two Houses presumably because it was regarded as simpler, and as likely to be just as or more effective and less apt to cause "trouble in a diplomatic way." [15]

In explaining the plan embodied in his bill, Senator Reed of Pennsylvania asserted that the visa would have a double effect; that it would insure the holder's admission under the quota law, and would also "make sure, as far as we are able to do it, that the immigrant is not within one of the prohibited classes who would be debarred on reaching this country." He also made the following claims as to the merits of the plan, from a humanitarian as well as practical point of view:

> We feel that more than nine-tenths of the debarments which have taken place in our ports will be avoided by this system of examination in connection with the issuance of the visé certificates. We know that the excess-quota cases will disappear, of course. It is obvious also that the illiteracy cases will never reach our ports, because the steamships will not take them without a visé certificate, and they can not get a visé certificate without writing out their application, so that those who can not write will never get started.
>
> In the same way those who would become a public charge do not get here, because the consul asks them as one of the very first questions when they come for the certificate whether they have the amount of money that the immigration law requires them to have, and whether their ability to work is in any way impaired, as by amputations or disease. So we think that out of the 20,000 debarments—if I may

[12] H. Rep. 350, 68th Cong., 1st sess., pp. 18–19.

[13] Sections 2 and 6 in the original House bill (H. R. 6540) and also in the bill finally passed by the House (H. R. 7995).

[14] *Id.*, and H. Rep. 350, 68th Cong., 1st sess., pp. 10–11.

[15] See Senator Reed's explanation of the differences between the two plans, *Congressional Record*, Vol. 65, Part 6, p. 5466.

> coin that word—that have taken place in the last fiscal year at least 18,000 of them would never have occurred if we had had this system in effect last year.[16]

While perhaps it may be doubted that the benefits will be as great as thus prophesied, certainly the plan has much to commend it from every point of view. Indeed, it would be almost an ideal arrangement but for two serious deficiencies that must be apparent upon its face to all persons familiar with the operation of our immigration laws, to wit:

(a) No provision is made for inspection by United States medical officers prior to the procurement of the visa. One of the greatest menaces of immigration has always been the entry to this country of the mentally unsound, and perhaps no one thing has produced as much hardship as has the arrival at our ports of aliens, especially women and small children, afflicted with dangerous contagious diseases. Ordinarily it will be impossible for consular officers to detect either mental or physical afflictions. Why was this branch of the subject neglected in a measure in most other respects so carefully devised?

(b) Absolute authority to refuse the visa is vested in consular officials. No provision is made for an appeal. If the consul concludes that an applicant is an "undesirable," he may, without any chance of his reasons being reviewed by anyone else, simply decline to issue the visa; and no matter how insufficient or technical his reasons may be, the alien has no redress.[17] This is the first time in the history of immigration legislation that subordinate officials have been allowed finally to determine the question of admissibility, in any other than technical medical cases, and even in those appeals to boards of surgeons have usually been possible. And the records of the Department of Labor contain numerous cases in which, had it not been for the right of appeal, most serious injustice would have been perpetrated; while the reports of the Federal courts contain many cases in which, even *with* the appeal to superior administrative officers, unfairness and arbitrariness prevailed.

7. *Classes exempted.* The general immigration law applies to *aliens*. The new quota law applies to *immigrants* only. And it divides immigrants into two classes—"quota immigrants" and "non-quota immigrants."[18] Therefore, of course, an alien who is not an immigrant does not come within

[16] *Id.*

[17] Senator Reed's reply, when Senator Copeland asked the question "Does it not place undue power in the hands of a consul?" can hardly satisfy those who know the extent to which the power of arbitrary decision has been abused in connection with the enforcement of the immigration and exclusion laws. His answer was that the matter would be "practically" cared for because of the supervision exercised over the consuls by their superiors, abroad and in Washington (*Congressional Record*, Vol. 65, Part 6, p. 5466). But with no provision under which individual cases can reach those superiors, how can any alien who suffers an injustice secure that prompt redress to which, in all fairness, he is entitled?

[18] Secs. 4 and 5.

the reach of the statute at all. But the non-quota immigrant, as well as the quota immigrant, must secure a visa. To the quota immigrant it is given only if a quota for his nationality is open, and it does not appear to the consul that he belongs to an excluded class. To the non-quota immigrant, as such, it is given whether or not a quota for his nationality is open, provided he furnishes "satisfactory proof" that he "is entitled to be regarded as a non-quota immigrant," and it does not appear to the consul that he belongs to an excluded class.[19] While alien residents returning from a temporary visit abroad are classed as non-quota immigrants,[20] special provisions are made for the issuance to them of return permits,[21] and authority is given for the issuance of regulations under which such aliens may be excused from procuring the visa. These may, therefore, be said to constitute a separate class of exempts. So that the aliens absolutely exempted from the provisions of the act excluding by the quota system may be said to fall into the following three classifications:

(a) *Those exempted as non-immigrants*, and therefore entirely outside the law, are enumerated in Section 3. The first four of those numbered clauses need no comment. They describe exemptions with the character of which persons at all familiar with the operation of previous laws are familiar. The fifth is discussed fully hereinafter.[22]

The sixth, covering the merchant class, is of great importance from both a domestic and an international point of view. It was not in the original bill, and was inserted in the second bill reported by the House committee as the result of a suggestion made by the Secretary of State, who was extremely anxious that the law should not contain anything calculated to interfere with the observance of our commercial treaties. The committee in adopting it intended that it should "take care of all the clauses of all our commercial treaties." [23] In view of the importance of our foreign commerce and of the fact that we have treaties of a commercial character with many countries, it is obvious that this provision must be construed and applied liberally and with the purpose of seeing that neither the letter nor spirit of the treaties is violated. Otherwise the clearly expressed intent of the Congress will fail of observance, and international misunderstandings and controversies will be constantly arising.

This provision, it should be carefully observed, is an absolute exemption, not only from the quota excluding clause of the law,[24] but also from the clause excluding aliens ineligible to citizenship.[25] Of course, therefore, it is

[19] Secs. 8 and 2 and subd. (g) of Sec. 11.
[20] Subd. (b), Sec. 4.
[21] Sec. 10.
[22] Under the heading *Alien Seamen*.
[23] H. Rep. 350, 68th Cong., 1st sess., pp. 2–5.
[24] Subd. (a), Sec. 13.
[25] Subd. (c), Sec. 13.

just as broad, and just as narrow, with respect to one class as the other. Note also that it exempts those entitled to enter under *and in pursuance* of existing commercial treaties. On its face the exemption is in deference to the provisions of the various treaties. This obvious circumstance is borne out by everything on the point contained in the reports and debates relating to the bills which formed the act as passed.[26] Clearly, therefore, the various commercial treaties must be the source from which to ascertain the nature and extent of the privileges conferred by this exemption.

While, apparently, no instructions or regulations have as yet been issued by the Secretary of Labor with respect to the application of this exemption in the cases of aliens coming from countries to nationals of which generally the quota provisions relate, such regulations and instructions have been issued concerning those coming from countries to the nationals of which generally the ineligible to citizenship clauses relate.[27] If these instructions can be taken to indicate a general attitude toward this exemption—and as the law clearly contemplates that such exemption is to be applied to all affected by treaties in exactly the same way, they surely can be so taken—then the mercantile classes from the several countries with which we have commercial treaties will certainly have just cause for complaint. For the Secretary says in his instructions, that this exemption cares for "only those aliens coming to the United States in the course of a business which involves, *solely or principally*, trade or commerce between the United States and *the country from which they come*"; and, in his regulations, he specifies that no Chinese merchant claiming the right to enter under such exemption shall be admitted unless he proves that he is coming "for the sole purpose of engaging in trade and commerce between the United States and the country from whence (*sic*) he came." [28] The Secretary ignores the words in the exemption "in pursuance of," and, in effect, reads into the exemption, before the word "trade," the words "import and export," and, after it, the words "with the particular country from which he is at the time coming." Treaties having the object of encouraging commerce are not ordinarily drawn in any such narrow terms; but it is in these treaties that the measure of the privileges here in mind is found.

Moreover, in the regulations and instructions just cited, the Secretary of Labor takes the position that the wives and dependent children of aliens admitted under this exemption can not accompany or join the exempted merchants here. This also would seem to be entirely too narrow a view of the law. May it not be anticipated that the courts, in cases which may

[26] H. Rep. 350, 68th Cong., 1st sess., pp. 2, 3, 4; House debate, *Congressional Record*, Vol. 65, Part 6, pp. 5648, 5661; *id.*, Part 8, pp. 8228–8233; Senate debate—*Congressional Record*, Vol. 65, Part 6, pp. 5743, 5744, 5746; *id.*, Part 6, pp. 6302, 6303, 6316.

[27] Bureau of Immigration Circular of Instructions No. 55266, dated Aug. 7, 1924; Bureau of Immigration General Order No. 4, dated Aug. 7, 1924.

[28] *Id.*

hereafter arise concerning aliens of the mercantile classes coming from countries of Europe with which we have commercial treaties, will take a view similar to that which they have heretofore taken in construing the Chinese treaty of 1880? [29] Their holdings with respect to that treaty have been that men entitled thereunder to come here for business purposes are entitled to have their wives and dependent children with them; that such wives and children, like the husbands and fathers, belong to the merchant class; [30] and also, in effect, that to exclude the wives and children "would obstruct the plain purpose of the treaty of 1880 to permit merchants freely to come and go." [31]

(b) *Those exempted as non-quota immigrants*, and therefore admissible even though their quotas are exhausted, are enumerated in Section 4. The third and fifth of these exemptions need no comment. With respect to the first, it should be stated that clearly Congress intended it to be a broad and complete non-quota exemption; for the House committee, when giving on the front of its report a list of the things effected by the bill, said: "The bill . . . exempts wives (and) children under 18 . . . of American citizens." [32] It will be observed that the citizen must be residing in the United States in order for the alien wife or child to be admitted as a non-quota immigrant. Also that the entry of the wife or child as such is to be brought about through the filing of "a petition under Section 9" by such citizen. That section is captioned—

Issuance of Immigration Visas to Relatives, and bears also upon the subject of "Preferences within quotas" discussed hereinafter.[33] By Section 9 consular officers are prohibited from issuing a non-quota visa to an alien who claims to be a non-quota immigrant through relationship to a citizen unless and until authorized to do so by the Secretary of State. The authorization of the Secretary of State is obtained on the basis of an application

[29] The treaty of 1880 with China is held by both the Secretary of State and the Secretary of Labor to be a commercial treaty within the meaning of the new law (Instructions of Aug. 7, 1924, *supra*), as obviously it is when considered in conjunction with the treaty of 1903 with China.

[30] *In re* Chung Toy Ho and Wong Choy Sin, 42 Fed., 398, 399, cited with emphatic approval in United States *v.* Mrs. Gue Lim, 176 U. S., 459, 464.

[31] Yee Won *v.* White, 256 U. S., 399, 400, 401. The application of this exemption to the cases of aliens coming from countries the nationals of which generally are excluded by the ineligible to citizenship provisions will be more fully discussed in the next article on this subject to appear in the JOURNAL.

[32] H. Rep. 350, 68th Cong., 1st sess., p. 1. "Wives" here, of course, in view of the terms of the Cable Act (42 Stat. L., 1021), means all alien women married to citizens; but "children," in view of the fact that all children born abroad to American fathers are, under Sec. 1993, R. S., themselves citizens, means only children of *naturalized* citizen fathers, born abroad while the fathers were still aliens; it not being possible for such children to acquire citizenship until they commence "to reside permanently in the United States." (Sec. 5, Expatriation Act, 34 Stat. L., 1228; Zartarian *v.* Billings, 204 U. S., 170.)

[33] Under the heading "Preferences within the quotas."

filed with and investigated by the Commissioner General of Immigration. The exemption is so drawn that either a male or a female citizen resident in the United States may make the application for the issuance of a visa to a child under the age of 18.[34] The detailed provisions of the section are clear, and need no comment further than to say that a blank form of application [35] has been prepared by the Bureau of Immigration, which has also issued a set of regulations on the subject.[36]

The fourth exemption obviously must have been placed in the law to meet the situation disclosed by the Gottlieb case.[37] Apparently Congress anticipated that the decision of the Circuit Court of Appeals, Second Circuit, in that case would be overturned by the Supreme Court, as later happened,[38] and adopted this provision to prevent the hardship that had resulted when in that case the administrative officers admitted a rabbi and excluded his wife and little children. At the same time it placed in the act [39] provisions the purpose of which doubtless is to guard against the sweeping effects of the decision of the lower court in the Gottlieb case—a decision well exemplifying the old adage "hard cases make bad law."

The second non-quota exemption, for the reasons already indicated, really constitutes a separate class, to wit:

(c) *Those exempted as returning immigrants.* Under Section 10 of the act any alien lawfully resident in the United States may obtain from the Commissioner General of Immigration a permit to reënter. Full details as to the nature and limited effect of the permit are given in the six paragraphs of that section; and the Commissioner General has issued a circular of instructions on the subject.[40] Applications for such permits must be filed with the Commissioner General before the applicant goes abroad; but, if the applicant is in a hurry to leave, will be forwarded to his foreign address if and when issued. The permit covers a period "specified therein," "not exceeding one year," but may be renewed for periods not exceeding six months, on the basis of an application, which must also be sent to the Commissioner General at Washington, D. C. Under another provision of the law [41] and the regulations just mentioned, temporarily absent alien residents holding an unexpired permit of this character are excused from securing from a consular officer an immigration visa. But no temporarily absent

[34] See further comment hereinafter, under the heading "Preferences within the quotas."

[35] Form 633.

[36] Entitled: "Issuance of Immigration Visas to Relatives; Instructions for executing Form 633."

[37] United States *ex rel* Gottlieb *v.* Commissioner of Immigration, 285 Fed., 295.

[38] Commissioner of Immigration *v.* Gottlieb, U. S. Sup. Ct. Adv. Ops., 1923–24, No. 16, p. 588.

[39] Sec. 5.

[40] Form 634, entitled "Instructions for executing application for permit to reënter United States." The blank form of application is designated Form 631.

[41] Subd. (b), Sec. 13.

resident alien is allowed to return to the United States unless he has either an unexpired permit or a visa.

(d) *Those exempted as unwitting non-observers of the law.*[42] The law [43] excludes any immigrant who, on arrival at a United States port, is found to be (a) not of the nationality specified in his visa, or (b) a quota immigrant although specified in his visa as non-quota. Under this exception the Secretary of Labor may admit any otherwise admissible immigrant excluded at a port for either of these reasons, if the Secretary becomes "satisfied that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel from the last port outside the United States and outside foreign contiguous territory, or, in the case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission." But if the alien involved is a quota immigrant, this power can be exercised only in the event a quota is open for him at the time; and the power of the Secretary of Labor is still further limited by requiring that, even if a quota is still open, the alien shall have the benefit thereof only if the Secretary of State deems it practicable to make effective before the end of the current fiscal year the reduction in the quota which would arise from his admission.

(e) *Bonding of exempts.* By Section 15 authority is conferred upon the Secretary of Labor to promulgate regulations to fix the conditions under which and the periods for which five of the classes exempted as non-immigrants and one of the classes (students) exempted as non-quota immigrants may enter. By the same provisions authority is also granted for the exaction of bond in the cases of aliens belonging to four of the classes exempted as non-immigrants, to wit: temporary visitors, transits through the United States, transits from one part of the United States to another through contiguous foreign territory, and those entitled to enter for business purposes "in pursuance of the provisions of a present existing treaty of commerce and navigation."

In the regulations [44] it is provided that in cases in which an alien has been granted a visa by a consular officer as a temporary visitor, a transit, or a person entering to carry on trade under a treaty, the immigration officer in charge at the port of arrival, if not satisfied that the alien is coming for the purpose stated, may compel such alien to furnish a bond in the sum of $500. The wisdom, if not also the legality, of this absolute delegation of authority to subordinates may be doubted. Especially would this seem to be true with respect to merchants found by the consuls abroad to be coming here in pursuance of a commercial treaty. In such cases, at least, it seems probable that experience will show the exaction of bond must be very carefully super-

[42] This peculiar exemption is found in subds. (d) and (e), Sec. 13.

[43] Subd. (a), Sec. 13.

[44] Bureau of Immigration General Order No. 30, June 6, 1924, caption "Bond Provisions."

vised. Congress has clearly indicated the intent that the law shall not so operate as to interfere with treaty rights, and doubtless many cases will arise in which an attempt to compel the furnishing of a bond would be regarded as in derogation of treaty rights, and as the useless giving of offense.

8. *Preferences within the quotas.* The provisions on this subject, found in Section 6, are simple and explicit. Two distinct classes of quota immigrants are to be given preference in the granting of visas.

The first relates to certain relatives of United States citizens (such citizens being 21 years of age or over). To get a clear idea of the meaning it is necessary to consider together this provision and the non-quota exemption in favor of the children of citizens appearing elsewhere in the act and already discussed.[45] This is the situation:

> The wife, or unmarried children under 18 years of age, of a citizen of the United States who resides in the United States at the time of executing and filing Form 633 are non-quota immigrants, and are entitled to admission to the United States regardless of quota limitations.
>
> If the citizen husband, or father, instead of residing in the United States, resides abroad at the time of filing Form 633, then his wife, or unmarried children under the age of 21, are quota immigrants and entitled to preference in the issuance of immigration visas.
>
> The unmarried children, between the ages of 18 and 21, of a citizen of the United States who is 21 years of age or over are quota immigrants and entitled to preference in the issuances of immigration visas, regardless of the place of residence of the citizen parent.
>
> The father, mother, or the husband of a citizen of the United States who is 21 years of age or over and who resides either in the United States or abroad at the time of executing and filing Form 633 are quota immigrants and entitled to preference in the issuance of immigration visas.[46]

The second class of preferences consists of aliens "skilled in agriculture" and their wives and children under the age of 16. It was placed in the law as an amendment offered by Senator Simmons on the floor of the Senate, and its obvious purpose is to encourage the entry, within the quota limitations, of persons who will settle in rural communities and benefit agricultural enterprises.[47]

The specification that neither class shall in practice be accorded "a priority in preference" over the other would seem to be calculated to cause embarrassment, occasionally at least.

9. *Operation of law in contiguous foreign territory.* The third non-quota exemption [48] is in favor, among others, of aliens born in either of the two countries contiguous to the United States. So that all such aliens are en-

[45] Subd. (a), Sec. 4, discussed under "Classes exempted."

[46] Department regulation entitled "Issuance of Immigration Visas to Relatives."

[47] See *Congressional Record*, Vol. 65, Part 7, pp. 6522–6528 and 6549–6551.

[48] Subd. (c), Sec. 4.

titled to receive non-quota visas. And in this act, as in previous immigration laws, Congress has recognized the fact that our close and neighborly commercial and social relations with our two next door neighbors necessitates that immigration from and through their territory shall be regulated and controlled along flexible lines. Therefore, the repetition in Section 17 of those portions of Section 23 of the general immigration law of 1917,[49] the purpose of which was to allow the administrative officers the utmost possible discretion in the supervision of this very difficult phase of immigration.

10. *Expulsions under the new act* are to be effected through the administrative processes provided in the general immigration law. And expulsion is to occur no matter how long the alien has lived in the country undisturbed by officers of the government, if it is ascertained that at the time of entry he was not entitled to enter under any of the provisions of the act, or even if it is ascertained that his offense has been merely remaining a "longer time than permitted under this act or regulations made thereunder." In this respect the law is the most drastic ever passed. Heretofore Congress has always thought it fair and proper to place a three year limit upon the power to expel where the offense involved is no more than an evasion of inspection, and a five year limit upon cases in which the alien was at the time of entry a member of one of the classes excluded, the cases to which no limitation was attached being those of the anarchistic, criminal, and sexually immoral classes.

11. *Offenses and penalties.* By Section 16 it is made unlawful for any person, transportation company, or vessel to bring to the United States by water from any place outside thereof, except contiguous foreign territory, any immigrant not in possession of an unexpired visa, or any quota immigrant possessing a visa describing him as a non-quota immigrant. A fine, administratively assessed, in the sum of $1,000 is the penalty for committing either of these offenses, and, in addition the amount paid by the immigrant for his transportation must be paid over to the officials for refund to the alien when deported. This legislation is unprecedentedly drastic. The fines are five times as large as those ever heretofore assessed for similar offenses. Moreover, while perhaps neither the wisdom nor the fairness of fining a transportation company for bringing to this country as a non-immigrant without a visa an alien who is an immigrant, can be questioned, it does seem altogether unfair to fine such a company for bringing "any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant," and quite as unfair to compel the company to refund the cost of such alien's ticket. The visa wrongly describing such an alien is given him by an official of the United States Government authorized to issue it only upon "satisfactory proof . . . that the applicant is entitled to be regarded as a non-quota immigrant."[50] The immi-

[49] 34 Stat. L., 898.
[50] Sec. 8.

grant furnishes that "satisfactory proof." The transportation company takes no part in the matter. If not satisfied of the *bona fides* of the claim the consul can deny the application, and compel the applicant to proceed on a quota immigrant visa or not at all. Is it the purpose of the law to force the transportation company to go behind these visas and make an investigation of its own in every case in which an immigrant presents a non-quota visa? The harshness of the provision is somewhat relieved, however, by the fact that the precedent set for the first time in the 1921 Quota Act is followed, and the refunding of these fines allowed if the Secretary of Labor is satisfied that the offender "did not know, and could not have ascertained by reasonable diligence," prior to the departure of the vessel from the foreign port, that the person falsely claiming to be a non-immigrant or a non-quota immigrant, respectively, was not indeed such. It is to be expected that many of these fines will be assessed only to be refunded; for by what kind of "reasonable diligence," in the average case, can a steamship official prove that an alien has deceived a consul, and will it not often be just as difficult to ascertain, no matter how diligent the inquiry, that an alien who claims to be a non-immigrant is in fact an immigrant?

Other similar drastic provisions are found in Section 26, where Section 9 of the 1917 act is amended by multiplying the amount of the penalties by five, and in one instance by ten; and there the original provision that the fines shall not be remitted or refunded is allowed to stand.

Excellent provisions are found in Section 22 for the severe punishment, on conviction, of persons who may forge, counterfeit, or alter visas or permits, or utter, use, etc., forged or counterfeited visas or permits, etc.; of those who falsely personate others, or attempt evasion of the law by appearing under assumed names, or who furnish a visa or permit to a person not authorized by law to receive it; and of those who commit perjury in connection with the enforcement of the immigration laws.

12. *The alien seamen provisions.* The new act, like previous immigration laws, contains provisions some of which relate to aliens who are *mala fide* seamen and others of which relate to those who in good faith are members of that calling.

(a) *The bona fide seamen provisions.* "A *bona fide* alien seamen serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman" [51] is not an immigrant within the meaning of this law. Therefore, an alien who is a *bona fide* seaman arriving at a domestic port "from any place outside the United States" [52] is neither a quota nor a non-quota immigrant, and the only provisions affecting him are found in Sections 3 and 15 of the new law, under the captions "Definition of Immigrant," and "Maintenance of Exempt Status," respectively.

[51] Clause (5), Sec. 3.

[52] Sec. 3, opening clause.

While the effect of Section 3 is to place non-immigrants outside the reach of the provisions relating to quota and non-quota immigrants, respectively, Section 15 contains provisions to the effect that the admission of certain non-immigrants "shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed to insure that" when the period of their temporary admission has expired such aliens will depart from the United States. Under this authority the Secretary of Labor has issued regulations [53] the dual purpose of which is to permit all alien seamen who satisfy the Inspection Officers that they are *bona fide* members of that calling to enter the United States freely in the pursuit of their calling, and to prevent aliens who are merely pretending to be seamen from entering the United States in violation of law. The time during which a *bona fide* seaman may remain in ports of this country without reshipping foreign is fixed at sixty days, and any alien seaman remaining longer, it is specified, shall be deemed to have abandoned his status and shall be taken into custody and deported.[54]

Quite properly, the Secretary does not attempt to exact a bond in cases of this kind. Clearly the language of Section 15 and its references to clauses of Section 3 in connection with the authorization of bonds justify no other conclusion than that bonds could not be exacted. And the history of the legislation most distinctly indicates that the intention was that bonds should not be required in such cases. Suggestions were made for the incorporation in the law of a provision conferring such authority.[55] These provisions were opposed, not only before the House committee,[56] but before the Senate committee.[57] The result was that the bonding proposal in each and every form in which it had appeared was omitted from the measure as finally passed. And it is clearly shown by the debates that Congress concluded that a bonding provision should not be inserted because it would have the effect of repealing those provisions of the Seamen's Act of 1915,[58] which confer upon all alien seamen the right freely to go ashore in ports of this country.[59] Moreover, an attempt made to exact bonds in the cases of *bona fide* seamen of Asiatic races, under regulations promulgated in supposed pursuance of the 1917 act, had been disapproved by the courts.[60]

[53] Bureau of Immigration General Order No. 38, dated Sept. 10, 1924.

[54] *Id.*, subd. 6, par. (c).

[55] See Committee print of H. R. 101, 68th Cong., 1st sess.; Hearings before Committee on Immigration and Naturalization, House of Representatives, 68th Cong., 1st sess., on H. R. 5, H. R. 101, H. R. 561, H. R. 6540, Serial 2–A, pp. 1107–1148; and *id.*, on H. R. 5, H. R. 101, and H. R. 561, Serial 1–A, pp. 152–180.

[56] References just given.

[57] Hearings before the Committee on Immigration, United States Senate, 68th Cong., 1st sess., on S. 2365 and S. 2576, pp. 198–203.

[58] 38 Stat. L., 1164.

[59] *Congressional Record*, Vol. 65, Part 6, p. 5830; *id.*, Part 9, p. 8577, pp. 8824–8825.

[60] United States *ex rel* Lum Young *v.* Stump, 292 Fed., 354, and United States *ex rel* Ho Chung *v.* Tod, therein described, *id.*, p. 360.

(b) *The mala fide seamen provisions.* These are found in Sections 19 and 20, and, like all of the provisions of the seamen's sections [61] of the 1917 act, except those relating to the preparation of crew lists and the prevention of the entry of seamen afflicted with dangerous contagious diseases, refer only to alien seamen "excluded from admission into the United States under the immigration laws." That language, descriptive of the kind of alien seamen intended to be reached by the laws, was construed by the courts [62] to confine the statute to those who were merely pretending to be seamen in an effort to gain unlawful admission to the United States, when inadmissible as immigrants, as no seaman, *as such*, was excluded from the United States by any of the immigration or exclusion laws. Of course, Congress must be presumed, when it placed in the new law upon this subject provisions relating to seamen and incorporated therein the exact language of the old law, to have readopted that language with knowledge of the judicial construction placed upon it.[63]

It is unfortunate that this subject has not been more thoroughly dealt with. There is probably no one way in which, heretofore, violations of the immigration law have occurred more frequently or more seriously than through the *mala fide* adoption of the seamen's calling by aliens of the inadmissible classes. Although the Seamen's Act conferred upon seamen of all nationalities and races the right freely to go ashore in ports of this country, that right is conferred only with regard to those who are *bona fide* members of the calling and is limited to temporary entry in the pursuit of their calling; and, while this, of course, makes it necessary so to form immigration legislation as not to interfere with such rights of *bona fide* seamen, it does not prevent the enactment of legislation of a character calculated to give the immigration officials at least a fair chance of preventing violations and evasions of law.

In two rather minor respects the new law is an improvement over the old, to wit: (a) it is made the *imperative* duty of ship masters to prevent the landing of any seaman until the immigration officers have had an opportunity to examine his crew, and also to prevent the landing at all of any seaman who has been found to be *mala fide* and inadmissible and ordered held on board; [64] and (b) a rule of evidence is adopted,[65] which is intended

[61] Sections 31 to 36.

[62] United States *ex rel* Lum Young *v.* Stump, 292 Fed., 354, and United States *ex rel* Ho Chung *v.* Tod, therein described, *id.*, p. 360.

[63] Edwards *v.* Wabash Ry. Co., 264 Fed., 610, 618, C. C. A., 2d Cir. See also Latimer *v.* United States, 223 U. S. 501; United States *v.* Cerecedo Hermanos y Compania, 209 U. S. 337; Heald *v.* District of Columbia, 254 U. S., 20; Von Bremen, McMonnies & Co. *v.* United States, 168 Fed., 889, C. C. A.; United States *v.* G. Falk & Bros., 204 U. S., 143.

[64] Compare Sec. 20 of the new law with Sec. 32 of the old, and note that the word "negligent" no longer appears in modification of the word "failure"; and see *The Nanking*, 290 Fed., 769.

[65] Subd. (b), Sec. 20.

to increase the incentive upon the part of ship masters against allowing the escape into the country of inadmissible aliens posing as seamen. But these improvements have been more than offset by the failure to have the act provide some reasonably satisfactory method of identifying aliens allowed to go ashore in United States ports on the claim that they are *bona fide* seamen; and by the fact that, although it was possible under the 1917 act to enforce regulations having their identification by a system of identification cards in mind, provisions which were in the bills until they went to conference contemplating the use of such identification cards were deliberately omitted from the measure before it was enacted into law. The report of the conference committee [66] makes no explanation of this omission; but an explanation of it was made on the floor of the Senate by the Senate manager of the conference.[67] It is thus clearly indicated that Congress, negatively at least, disapproved of the identification card system; and the Secretary of Labor has quite properly omitted from his recent regulations concerning alien seamen [68] any reference to the subject. Of course, the incentive to make use of this "loophole" is multiplied each time that the immigration law is made more restrictive; and it is difficult to imagine how the Department can possibly prevent extensive and serious violations of both the quota and the ineligible to citizenship provisions of this act, through the adoption *mala fide* of the seamen's calling by aliens belonging to nationalities or races excluded by such provisions.

The regulations contain a provision [69] of an eminently fair character with regard to the readmission to the United States of aliens previously lawfully resident here who have gone abroad while employed as seamen. Such an alien when returning and expressing an intention to resume his residence in the United States will be permitted to do so although he possesses no immigration visa. But another provision of the regulations [70] is open to criticism, not only as being calculated to lead to unfair and arbitrary action, but as probably being contrary to law. Under this provision the attempt is made to delegate to subordinate immigration officials final authority to determine whether or not an alien claiming to be a *bona fide* seaman is such and exclusive power to order, not only the detention on board, but the deportation of such alien. The law [71] obviously contemplates that aliens detained on board as *mala fide* seamen by the order of a subordinate official shall have the right of appealing to the Secretary of Labor; otherwise there would have been no occasion to mention the head of the Department in such provision.

[66] H. Rep. 716, 68th Cong., 1st sess.
[67] *Congressional Record*, Vol. 65, Part 9, p. 8577.
[68] Bureau of Immigration General Order No. 38, dated Sept. 10, 1924.
[69] Subd. 4 (a), General Order No. 38.
[70] Subd. 4 (b), General Order No. 38.
[71] Subd. (a), Sec. 20.

13. *The burden of proof provision.* Section 23 of the law is constituted of this very important provision. The explanation of it given by the House committee is doubtless correct: [72]

> An alien seeking to enter the United States should not stand mute, but should assist the Government by showing admissibility if he can. No longer should admissibility be presumed until the Government can marshal its forces to prove inadmissibility. An alien remains within the country not by right, but by sufferance. If the Government challenges him, alleging that he is remaining unlawfully, the burden should be upon him to prove the legality of his sojourn or residence. This means reversal of the present rule, which has operated to the detriment of the United States.

No doubt, referring to the standing mute of aliens, the committee had in mind the important decision of the Circuit Court of Appeals for the Second Circuit in the case of an ex-president of Venezuela.[73] The Commissioner General of Immigration, some years ago, called attention to the serious situation that existed in this respect. He said: "We have been in a position (exemplified so aptly by the famous Castro case) where an alien could knock at our doors and upon being asked who and what he was, could give his name and then refuse to answer any questions the purpose of which was to divulge his character and antecedents, and yet could demand admission upon the ground that we had failed to show that he was within one of the classes enumerated in the law as inadmissible. Obviously this situation is deplorable. A nation, no more than a man, should be placed in a position where an outsider can demand the opening of the door without giving a full account of himself and showing that he is a fit person to enjoy the hospitality that he seeks." [74]

While, obviously, this burden of proof provision will be of no particular value in the enforcement of the quota provisions of the new law in the cases of aliens who are quota immigrants (for in such cases the possession of a visa is indispensable anyway), the need for amending the law in this respect is no less now than it was when former Commissioner General Caminetti made the observation above quoted. Aliens must still pass muster under all of the previous laws left intact by the new act; but now they must affirmatively prove admissibility, and can not claim in any case that the government has failed to prove inadmissibility. Moreover, with the claims of non-immigrant and non-quota immigrant status which will arise so frequently under the new law, there will be still another field for the operation of this admirable improvement.

[72] H. Rep. 350, 68th Cong., 1st sess.

[73] United States *ex rel* Castro *v.* Williams, 203 Fed., 155.

[74] Annual Report of the Commissioner General of Immigration for 1919, p. 290.

CHANGES IN THE CONCEPTION OF WAR

By Quincy Wright

Of the Board of Editors

The phrase "outlawry of war" has come into current usage during the past few years. It has appeared in a resolution submitted to the United States Senate,[1] in speeches by Presidents of the United States[2] and in a draft treaty submitted by the Council of the League of Nations to its members.[3] As giving focus to a widespread popular demand for the elimination of war, the phrase doubtless has propaganda value, but some of its legal implications seem to invite examination. Thus, if we are called on to "outlaw war," that is, applying Bouvier's definition, to put war out of the protection of the law, we must assume that war is now within the protection of the law, that it is legal to make war. In fact, in Senator Borah's resolution of February 13, 1923,[4] we read in the preamble:

> Whereas, war between nations has always been and still is a lawful institution, so that any nation may, with or without cause, declare war against any other nation and be strictly within its legal rights; and
>
> Whereas, revolutionary war or wars of liberation are illegal and criminal, to wit: high treason, whereas, under existing international law, wars of aggression between nations are perfectly lawful. . . .

It is difficult to tell whether Senator Borah is under the impression that revolutionary wars are "high treason" under international law as well as under the municipal law of the state in question, but at any rate he is clear that wars of aggression are perfectly lawful under international law.

Does existing international law consider war lawful? Many have doubtless concluded that it does from the fact that they can find no authority

[1] Submitted by Senator Borah of Idaho, Feb. 13, 1923, Sen. Res. 441, 67th Cong., 4th Sess.

[2] "If I catch the conscience of America, we'll lead the world to outlaw war." (Candidate Harding, Sept. 4, 1920). "Contemplating the measureless cost of war and the continuous burden of armament, all thoughtful peoples wish for real limitations of armament and would like war outlawed." (President Harding, opening the Conference on Limitation of Armament, Nov. 12, 1921.) "I personally should favor entering into covenants for the purpose of outlawing aggressive war by any practical means." (President Coolidge accepting the Republican nomination for President, Aug. 14, 1924.) The Democratic party by its platform of 1924 pledged "all its energies to the outlawry of the whole war system."

[3] The draft treaty of disarmament and security proposed by a New York committee and submitted to its members by the Council of the League of Nations heads the first chapter, "Outlawry of Aggressive War." International Conciliation, No. 201, August 1924, p. 343. Printed also in New York *Times*, June 18, 1924, and Foreign Policy Association, Pamphlet No. 28, June 1924.

[4] *Supra*, note 1.

declaring war illegal and are aware that nations have frequently resorted to war from time immemorial. However, neither the frequent resort to war nor the absence of positive prohibition against war can justify the presumption that war is lawful. Physical events, accidents, acts of irresponsible persons may occur which are neither unlawful nor lawful. They fall into the category of events, considered incapable of legal control but entailing legal consequences.[5]

It is believed that war is regarded in exactly this category by existing international law. In principle, acts of war are illegal. Any violation of right is illegal unless justified by extraordinary circumstances,[6] and all authorities agree that inviolability of territory and exclusive control over public forces on the high seas or legally within foreign territory is a fundamental right of states under international law.[7] An act of war is an invasion of territory or an attack on public forces and so normally illegal. Such an act if not followed by war gives grounds for a claim which can be legally avoided only by proof of some special treaty or necessity justifying the act.[8] But if the act inaugurates war or is preceded by a declaration of war, there is no basis for a claim, in the absence of express treaty, unless the act was in

[5] On the distinction between "events" and "acts," see Holland, *Jurisprudence*, 11th ed., pp. 104, 105, and between lawful and unlawful acts, *ibid.*, p. 114.

[6] "It is obvious that to know the whole extent of the advantage conferred by the enjoyment of a right is the same thing as to know what acts are infringements of it." Holland, *Jurisprudence*, p. 148. On apparent infringements which prove not to be because of extraordinary circumstances, *ibid.*, p. 149. See also Salmond, *Jurisprudence*, p. 219.

[7] See Hall, *International Law*, 7th ed., p. 49; Westlake, *International Law*, 2nd ed., Vol. 1, p. 86; Hyde, *International Law*, Vol. 1, pp. 346, 432.

[8] Such acts would generally constitute "intervention," though some writers prefer to restrict that term to such acts as are not justified by special circumstances. (See Hyde, *op. cit.*, Vol. 1, pp. 116–117.) The injured party has seldom been able to collect a claim arising from intervention, because the intervenor is generally more powerful and consequently in a position to insist that special circumstances justified the intervention, and to refuse submission of the propriety of his action to impartial decision. Diplomatic correspondence, however, clearly indicates general acceptance of the view that reparation would be due unless special circumstances justify the act. See discussion of Italian occupation of Corfu in League of Nations Council, Sept. 1924, *League of Nations Official Journal*, Vol. 4, pp. 1277–1278; this JOURNAL, Vol. 18, pp. 541–542; Oppenheim, *International Law*, 3rd ed., Vol. 1, sec. 155; Fenwick, *International Law*, p. 161. The Colombian claim against the United States arising out of the intervention in Panama in 1903 was presumably liquidated by the payment of $25,000,000 in 1922, although the treaty of 1914, as finally ratified in 1922, made no express recognition of the validity of that claim. Where the two states are comparatively equal in power, the victim of an intervention generally considers the act as the inauguration of a state of war, but if he does not, as has sometimes happened where the act of force is of slight magnitude, an apology or other amend has always been demanded. (See several cases discussed by Oppenheim, *op. cit.*, Vol. 1, sec. 163). Third states whose citizens are incidentally injured by an intervention have sometimes presented claims to the intervenor, but it has been held that such claims lie against the territorial sovereign. See Secretary of State Marcy's note in reply to the French claims arising from the Greytown bombardment of 1852, Moore, International Law Digest, Vol. 6, p. 927.

violation of the law of war.[9] The incidence of an act or declaration converting the state of peace into a state of war establishes a division in time before which acts of war are illegal and after which they are legal between belligerents if within the law of war.[10] This does not mean, however, that the state of war itself is legal. Apart from special treaties or special necessities, international law views war as an event in its origin wholly apart from law, which, however, gives rise to modifications of the normal law as does flood, fire, insurrection or other extraordinary necessity in most systems of municipal law.[11] "International law did not institute war," says Westlake, "which it found already existing, but regulates it with a view to its greater humanity."[12] "War," says Oppenheim, "is a fact recognized, and with regard to many points regulated, but not established by international law."[13] "Grotius," writes John Bassett Moore, "surveying the history of man, sought to ameliorate the evils of an institution which he could not destroy. Time has vindicated his fruitful choice. His successors have been guided by his example."[14]

It is true that some writers have referred to war as a legal procedure for the redress of wrongs, but among modern writers they are a distinct minority.[15] In the treatment of the subject nearly all modern writers confine

[9] Hearings before Committee on Foreign Relations, U. S. Senate, 1919, 66th Cong., 1st sess. (Sen. Doc. 106, pp. 329, 336.) In reply to Germany's protest against Art. 227 of the Treaty of Versailles in which the "Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties," the Allies said: "The present treaty is intended to mark a departure from the tradition and practices of earlier settlements which have been singularly inadequate in preventing the renewal of war". Note June 16, 1919, 66th Cong., 1st sess. (Sen. Doc. 149, p. 126.) For German protest see *ibid.*, p. 94. See also Wright, *Am. Pol. Sci. Rev.*, Vol. 13, pp. 120 *et seq.*, *Minn. Law Rev.*, Vol. 5, p. 518; Garner, International Law and the World War, Vol. 2, pp. 490 *et seq.*

[10] *Infra*, note 36.

[11] *Infra*, notes 28, 29.

[12] Westlake, *op. cit.*, Vol. 2, p. 3.

[13] Oppenheim, *op. cit.*, Vol. 2, p. 67.

[14] Moore, *International Law and Some Current Illusions*, 1924, p. 37.

[15] Phillimore says: "War is the exercise of the international right of action to which from the nature of the thing and the absence of any common superior tribunal nations are compelled to have recourse in order to assert and vindicate their rights." Holland describes war as "the litigation of nations," *op. cit.*, p. 348. A similar view seems to be accepted by Fenwick who says: "States are legally entitled to resort to war as a means of redress when the necessity of doing so seems to them warranted by the importance of the interests involved and justified by the principles of international law as interpreted by themselves individually." *Op. cit.*, p. 428. These writers agree with the ancient Roman conception of war as a legal procedure, which was also adopted by the early writers on international law. *Infra*, note 46. The transition from this doctrine to the one held by most modern writers is illustrated by Hall, who writes: "International law recognizes war as a permitted mode of giving effect to its decisions." Consequently "it ought to determine the causes for which war can be justly undertaken," and "to discourage the commission of wrongs by investing a state seeking redress with special rights and by subjecting a wrongdoer to special liabilities," but in fact it is able to do neither, and consequently "accepts

themselves to the consideration of the two subjects: (1) when does war exist, and (2) what changes in the normal law are brought about by its existence. The propriety of making war is not discussed at all, or is treated as a question of ethics rather than of law. "Attempts to distinguish between just and unjust causes of war," writes Lawrence, "are supremely important; but they belong to morality and theology, and are as much out of place in a treatise on International Law as would be a discussion on the ethics of marriage in a book on the law of personal status."[16]

The question of when war exists is one of fact unrelated to the nature of the controversy beginning it, to the methods by which it is pursued or to the terms of the settlement ending it. War begins when any state of the world manifests its intention to make war by some overt act, which may take the form of an act of war, a declaration of war or an ultimatum with a time limit.[17] Between states parties to the III Hague Convention of 1907[18]

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war independently of the justice of its origin as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of this relation." (*Op. cit.*, pp. 61–62). Hall's conclusion is similar to the views of Westlake and Oppenheim (*supra*, notes 12, 13), and of Lawrence, Risley and Lorimer (*infra*, note 16.) Of the same opinion may be mentioned Wheaton, *Elements of International Law*, 8th ed., §295; Manning, *Commentaries on the Law of Nations*, 1839, pp. 94–104; Creasy, *First Platform of International Law*, 1876, p. 361; Moore, *International Law Digest*, Vol. 7, p. 171; Wilson and Tucker, *International Law*, 8th ed., pp. 235–240; Stockton, *Outlines of International Law*, p. 294; Davis, *The Elements of International Law*, 3rd ed., p. 272; Smith, *International Law*, 4th ed., p. 106; Hershey, *Essentials of International Public Law*, p. 349–352; Cobbett, *Cases and Opinions on International Law*, 2nd ed., Vol. 2, pp. 12–14. Hyde says: "It is the fact rather than the cause of war which demands consideration" (Vol. 2, p. 187), and later: "It lies within the power of states to have recourse to war." Doubtless little more than this is meant by Lieber's Code, Art. 67, which says: "The law of nations allows every sovereign government to make war upon another sovereign state." The present writer must confess to writing "the legal right to declare war has been unlimited unless special treaties intervened." (*Minnesota Law Review*, Vol. 5, p. 517, and see *American Political Science Review*, Vol. 13, p. 511.) It would be more accurate to say "The power to institute a state of war has been etc."

[16] Lawrence, *International Law*, 7th ed., sec. 135, p. 311. See also Risley, *The Law of War*, p. 68; Lorimer, *Institutes of the Law of Nations*, Vol. 2, p. 6; Fenwick, *supra*, note 15; Halleck and Woolsey, *infra*, note 46.

[17] See discussions with reference to Chino-Japanese, Russo-Japanese and Spanish-American Wars in Holland, *Letters on War and Neutrality*, 1914, pp. 34–38; Takahashi, *Chino-Japanese War*, p. 42; Russo-Japanese War, p. 25; Cobbett, *op. cit.*, Vol. 2, pp. 1–8; Benton, *International Law and Diplomacy of the Spanish-American War*, 1908, pp. 99–101, 109–115; *The Buena Ventura*, 175 U. S. 384; Naval War College, *International Law Situations*, 1910, pp. 45–65; Wilson and Tucker, *International Law*, 8th ed., p. 237.

[18] "The contracting powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war." Higgins, *The Hague Peace Conferences*, p. 198. All the states parties to this convention seem to have observed it in the series of wars beginning July 28, 1914. See Naval War College, *International Law Documents*, 1917, p. 15. Turkey was not a party and began war with France and Great Britain by hostile acts. *Ibid.*, pp. 90, 119.

war can only begin by the last two of these methods. Acts of war unaccompanied by a declaration do not begin war for such states, though they may call forth a declaration by the party attacked which does.[19] For states not parties to this convention, an act of war can always be construed by either the attacker or the attacked as initiating war, but if neither of them does so construe it, war does not exist.[20] Apparently acts of war include only attacks on the territory or public forces of a state. Seizure of foreign citizens or property within the jurisdiction, or of private vessels at sea, are not acts of war and do not in themselves initiate war, though they are frequently made the occasion for beginning war by the injured party.[21]

The existence of civil war is determined by precisely the same rules as of international war. Insurgents, not being a recognized state, can not by their own acts initiate war, and third states are not entitled to consider war in the legal sense as existing unless the parent state by some overt act, such as a declaration of war, enforcement of belligerent rights against neutrals, or conduct of military operations on such a scale that neutral interests are necessarily affected, manifests an intention to make war.[22] Prior to such overt act the conflict is domestic violence or insurgency, but not war.[23]

The existence of war is not dependent upon the type of operations undertaken by the belligerents. There may be no actual hostilities at all for considerable periods, or there may be barbarities in violation of the law of war, but war, if begun in fact and not stopped, will nevertheless exist. Thus the New York courts have held that "the death of the insured on board the *Lusitania* must be conceded to be a result of war" even though the death resulted from an act contrary to the law of war.[24] This decision

[19] Germany and France each alleged acts of war by the other prior to declaration, and the United States alleged such acts by Germany prior to declaration, but it was admitted in each case that the state of war did not begin until the declaration. *Ibid.*, pp. 86, 103, 225.

[20] This seldom occurs unless the victim is materially weaker. *Supra*, note 8.

[21] Such acts are called reprisals. If war follows, it does not retroact to the first seizure, but begins with the declaration or first act of war. Thus Takahashi realized that the *Ekaterinoslav*, a vessel of the Russian volunteer fleet, would have to be considered a public vessel if the Russo-Japanese War was to be dated from its capture. *Op. cit.*, p. 25. Westlake appears not to recognize this distinction, *op. cit.*, Vol. 2, p. 24. Although in early cases the United States Supreme Court held that the condition of reprisals between the United States and France from 1798 to 1799 constituted "limited war" (Bas *v.* Tingy, 4 Dall. 37, 1800, Talbot *v.* Seeman, 1 Cr. 1, 1801,) the Court of Claims later held that this did not mean war in the legal sense. Gray, Admr. *v.* U. S., 21 Ct. Cl. 340, 1886, Cushing, Admr. *v.* U. S., 22 Ct. Cl. 1, 1886; Hooper *v.* U. S., 22 Ct. of Cl. 408, 1887; Moore, *International Law Digest*, Vol. 6, pp. 1022–1025, Vol. 7, pp. 156–157.

[22] *The Prize Cases*, 2 Black 635, 1862; Bernard, *Neutrality of Great Britain during the American Civil War*, 1870, Chap. 4.

[23] *The Three Friends*, 166 U. S. 1, 1897; Wilson and Tucker, *op. cit.*, pp. 63–65.

[24] Vanderbilt *v.* Travelers Insurance Co., N. Y. Sup. Ct. 1920, 184 N. Y. Sup. 54, affirmed App. Div., 194 N. Y. Sup. 986, and Ct. of App., 139 N. E. 715; this JOURNAL, Vol. 17, p. 578.

indicates that courts do not look upon war as a legal procedure but as an unfortunate event.[25]

Once begun, the war continues to exist until ended by the destruction of one party manifested by proclamation of the victor, or by agreement of the two, manifested expressly by treaty or tacitly by protracted suspension of hostilities. In the last case the exact date of termination of war may be difficult to fix, though generally there is a unilateral pronouncement by one belligerent, which, if accepted by the other, marks the end of war.[26]

International law is obliged to recognize that, in the present state of international society, every sovereign state has the power to convert a state of peace into a state of war and having done so, to prevent the reëstablishment of peace until or unless destroyed. From this fact, writes John Bassett Moore, "an unnecessary and perhaps unwarranted inference is often drawn, namely, that a nation may lawfully or properly begin a war at any time and under any circumstances, with or without notice, in its own absolute discretion. Such a theory would seem to be altogether inadmissible. . . . To admit that a state of war exists is by no means to justify the mode by which it was brought about or begun." [27]

As for the second question, publicists and courts agree that international law recognizes special rules as suitable to the emergency of war. There has apparently been a tendency to assume from this recognition of the laws of war and neutrality that war is lawful. As well assume that rebellion and invasion are lawful under the United States Constitution because that instrument recognizes a special rule, suspension of the privilege of the writ of *habeas corpus*, when public safety requires on account of these eventualities.[28] When war exists as a fact, the ordinary laws will not work. *Inter arma leges silent.*[29] Of the alternatives, no law at all or an emergency law, the latter appears more consonant with the demands of humanity and neutral trade and has been accepted. In fact, emergency law similar to the

[25] The early publicists clearly recognized that hostilities could not be considered a legal procedure unless they were "properly conducted" (*Justa Contentio*). *Infra*, note 37.

[26] As in the war between United States and Germany. See Wright, *Control of American Foreign Relations*, 1922, p. 293; Miller *v.* Rouse, 276 Fed. 715, 1921; Field, *The Doctrine of Political Questions in Federal Courts*, *Minn. Law Rev.*, Vol. 8, p. 491.

[27] Moore, *International Law Digest*, Vol. 7, p. 171.

[28] Many constitutions go farther and permit proclamation of a state of siege, instituting martial law in case of emergency. Under the United States Constitution martial law was in actual effect in regions of the north during the Civil War, but the courts subsequently held such enforcement unconstitutional except in regions where the civil courts had ceased to function. *Ex parte* Milligan, 4 Wall. 2, 1866.

[29] After noting that this maxim of Cicero refers primarily to municipal law but may be applied also to international law, Moore says that its meaning may easily be misconceived. "It signifies in effect that, when a contest of force prevails, the ordinary rules and methods of administration become inadequate and give way to measures dictated by public necessity. The system by which the ordinary administration is superseded is called martial law." *International Law and Some Current Illusions*, 1924, p. 290. See also, *ibid*, p. vii.

laws of war and neutrality has been deemed appropriate in other emergencies of similar character, such as insurgency [30] and military occupation in time of peace.[31] Thus, evidently it is the emergency which justifies the special law and not the special law which justifies the emergency. The United States has insisted that application of the laws of war and neutrality during rebellion does not make the rebellion lawful under the Constitution.[32] No more does the application of these laws make war lawful under international law.

Under international law, therefore, war is not a lawful institution, but an event, an unfortunate event, like invasion under municipal law, which renders the operation of normal law impossible and makes application of an emergency law of war and neutrality a *pis aller*.

But even events can be prevented by human effort. Have statesmen and jurists, using law as an instrument, progressed toward controlling the recurrence of wars?

Here it may be well to notice an ambiguity in the term "war." Courts have distinguished between "war in the material sense" and "war in the legal sense." Said Justice Nelson:

> An idea seemed to be entertained that all that was necessary to constitute a war was organized hostility in the district or country in a state of rebellion—that conflicts on land and on sea—the taking of towns and capture of fleets—in fine, the magnitude and dimensions of the resistance against the Government—constituted war with all the belligerent rights belonging to civil war. . . .
>
> Now in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is, what constitutes war in a legal sense, in the sense of the law of nations, and of the Constitution of the United States? For it must be a war in this sense to attach to it all the consequences that belong to belligerent rights. Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the General Government, the inquiry should be into the law of nations and into the municipal fundamental laws of the Government. For we find there that to constitute a civil war in the sense in which we are speaking, before it can exist, in contemplation of law, it must be recognized or declared by the sovereign power of the State.[33]

[30] *The Three Friends*, 166 U. S. 1, 1897. "When insurgency exists, the armed forces of the insurgents must observe and are entitled to the advantages of the laws of war in their relations to the parent state." Wilson and Tucker, *op. cit.*, p. 64.

[31] Croes *v.* Harrison, 16 How. 164, 1854; Santiago *v.* Nogueras, 214 U. S. 260, 1909; Instructions for the Government of the Armies of the United States in the Field, Gen. Ord. 100, 1863, cited as Lieber's Code, Art. 2.

[32] *The Prize Cases*, 2 Black 665, 1863; Lieber's Code, Arts. 153, 154.

[33] Nelson, J. dissenting in *The Prize Cases*, 2 Black 635, 1863; Thayer, *Cases on Constitutional Law*, Vol. 2, p. 2348. Though the majority differed from Justice Nelson in holding that the President did not need to wait for Congress to recognize war in the legal sense, they did not deny this distinction, and it was later utilized by the court in *The Three Friends*, 166 U. S. 1, 1897. See also Hershey, *op. cit.*, p. 349.

A comparison of definitions discloses that each of these conceptions of war has been given two shades of meaning and thus four definitions may be distinguished.

In the material sense, war may be considered *an act or a series of acts of violence by one government against another*,[34] or a dispute between governments carried on by violence.[35]

In the legal sense *war may be considered a condition or period of time in which special rules permitting and regulating violence between governments prevail*,[36] or a procedure of regulated violence by which disputes between governments are settled.[37]

Thus the essence of war is successively considered an act, a controversy, a condition and a procedure. The first meaning which may be expressed by the phrase "act of war" is the usual conception of practical military men. To them war is a series of acts aimed at occupation of the enemy's territory, destruction of his military forces, and eventual reduction of him to complete

[34] Thus excluding acts by individuals or by a government against individuals as in reprisals. The following definitions do not make this limitation. "War is an act of violence intended to compel our opponents to fulfill our will." (von Clausewitz, *On War*, [1st ed., 1832] London, 1911, Vol. 1, p. 2.) "War is the greatest and most magnificent of human actions." (Montaigne, *Essays* [1st ed., 1580], Cotton, trans., London, Vol. 1, p. 394.)

[35] "War is a contest or contention carried on by force" (Cicero, Orat. c. 45 [55 B. C.]). "War is a conflict of great interests which is settled by bloodshed. . . . War is nothing but a continuation of political intercourse with a mixture of other means" (von Clausewitz, *op. cit.*, Vol. 1, p. 121, Vol. 3, p. 121.) "War is a contest as between nations or states, carried on by force and with arms" (*Standard Dictionary.*)

[36] "War is the state of persons contending by force, as such" (Grotius, *De Jure Belli ac Pacis*, 1625, I, c. 2, par. 2, and *infra*, note 38). It will be noticed that this and the three following definitions do not confine war to relations between states or political entities. "War is nothing else but that time wherein the will and intention of contending by force is either by words or actions sufficiently declared" (Hobbes, *De Corpore Politico*, 1650, P. I, c. 1, sec. 2.) "War is that state in which we prosecute our rights by force" (Vattel, *Droit des Gens*, 1758, iii, c. i, sec. 1.) "War is that state, in which men constantly exercise acts of indeterminate violence against each other" (Martens, *Précis du Droit des Gens*, 1788, VIII, c. 2, sec. 1.) "War is the state of nations among whom there is an interruption of all pacific relations, and a general contention by force, authorized by the sovereign" (Manning, *Commentaries on the Law of Nations*, 1839, p. 96.) "Public War is a state of armed hostility between sovereign nations or governments" (Lieber's Code, 1863, Art. 20, U. S. Rules of Land Warfare, 1914, Art. 24.) "War is the relation which exists between states or between political entities when there may lawfully be 'a properly conducted contest of armed public forces'" (Wilson and Tucker, *International Law*, 1922, 8th ed., p. 235.)

[37] "War is a properly conducted contest of armed public forces" (Gentilis, *De Jure Belli*, I, c. 2, 1588.) The qualification "properly conducted" (*justa*) seems to convert the simple idea of contest into the legal idea of procedure. "Wars are no massacres and confusions, but they are the highest trials of right when princes and states shall put themselves upon the justice of God for deciding their controversies as it shall please Him to put on either side" ([1625] Bacon, Works, Montague ed., Vol. 5, p. 384.) "War is a contest between independent parties by way of force or deceit, for the purpose of pursuing their rights." (Bynkershoeck, *Questiones Juris Publica*, 1737, I, c. 1.) See also definitions by Phillimore and Holland, *supra*, note 15.

submission. The second is the oldest and the usual lay use of the term war, generally given first place in dictionaries, but it lacks precision, since a dispute may gradually merge from methods of complete amity through displays of force, interventions and reprisals, to war in the material sense. The third meaning is commonly accepted by legal writers, and is thus distinguished from the second by Grotius:[38] "Cicero says that war is a contest or contention carried on by force. But usage applies the term, not to an action, but to a state or condition: and thus we may say, war is the state of persons contending by force, as such." Writers express this conception by various abstract terms signifying existence in time such as state, condition, relation, situation, and it can be emphasized by use of the term "state of war." The fourth meaning, as has been noticed,[39] is not commonly used by modern jurists who look upon war as an event rather than a legal procedure. War in itself does not legally settle a dispute. It may do so in fact but in law the dispute is settled by a declaration or treaty ending or following the war.

For purposes of precise discussion, the first and third meanings, "an act of war" and "a state of war," seem best to embody the essence of war in the material and legal senses respectively. The characterizations legal or illegal can properly be applied only to acts which proceed from responsible beings, not to events which exist from uncontrollable natural causes.[40] Thus we are presented with the paradox that war in the legal sense is an event neither legal nor illegal, while war in the material sense is an act at least capable of legal characterization.

The ambiguity in the term war indicates the doubt which exists in many minds as to whether war does ordinarily proceed from responsible action or from natural causes, a doubt reflected in many of the comments on responsibility for the World War.[41] If wars are in fact inevitable, as many assert them to be, they are rightly to be classed with volcanic eruptions, tornadoes, droughts and similar phenomena which, however destructive, can not be attributed to responsible beings subject to legal control.[42]

The state of science and philosophy has a great deal to do with the ordinary attribution of events to the categories of responsible acts or natural

[38] Grotius, *op. cit.*, I, c. 2, par. 2. See also Vattel, III, c. 1, sec. 1; Fenwick, *op. cit.*, pp. 428–429; Moore, *International Law Digest*, Vol. 7, p. 153.

[39] *Supra*, note 15.

[40] *Supra*, note 5.

[41] See summary of much of this literature in article by Harry Elmer Barnes, *Current History Magazine*, May, 1924, Vol. 20, p. 171, and comments by ten historians and political scientists thereon, *ibid.*, June, 1924, Vol. 20, p. 452.

[42] Extreme complexity of causation would have the same effect from the standpoint of placing responsibility as inevitability. "No war, strictly speaking, is inevitable; but in a storehouse of high explosives it required rulers of exceptional foresight and self-control in every country to avoid a catastrophe." Gooch, *Recent Revelations in European Diplomacy, Journal of the British Institute of International Affairs*, Jan. 1923, p. 29. See also Gooch, *History of Modern Europe*, pp. 534–559.

events. The Middle Ages, with a philosophy which viewed all nature as the manifestation of design, was inclined to trace all events to responsible agency. Animals, trees or even stones and weapons were subjected to legal responsibility for injury to human beings, and events for which no agency within the power of the court could be held responsible were called "acts of God." Someone or something was to blame for all ills which occurred.[43]

The modern scientific habit of thought has tended in an oppostie direction. The field of natural facts has expanded at the expense of responsible acts until we find criminologists and psychiatrists who would abandon the conception of crime altogether and hold that the "criminal," even though sane in the usual sense, is so controlled by heredity and environmental influences that he could not have acted other than he did. He should be treated by the social service agency or the physician, not committed to the jailer.[44] Parallel, however, with this tendency to relegate the term "responsibility" to obsolescence, has developed through applied science an actual capacity of man to control future phenomena. Precautions against infection in an operation which would have been perfectly normal before Pasteur, might now subject a physician to criminal responsibility.[45] While scientific theory has narrowed the field of responsible action, applied science has widened it.

Thus with regard to war, the early jurists steeped in medieval habits of thought sought to impute legal responsibility for wars with the distinction between just and unjust causes for war.[46] It may also be noticed that the employment of standards of responsibility for state action similar to those

[43] Holmes, *Common Law*, pp. 7–11; Holland, *op. cit.*, p. 154; Gray, *Nature and Sources of the Law*, 1916, secs. 100–110; Evans, *Criminal Punishment and Prosecution of Animals*, N. Y., 1906.

[44] Bernaldo DeQuiros, *Modern Theories of Criminality;* Ferri, *Criminal Sociology*, 1917, pp. 288 *et seq.;* Parmelee, *Criminology*, 1918; McConnell, *Criminal Responsibility and Social Constraint*, 1912; Darrow, *Crime, the Cause and Treatment*, 1922.

[45] Salmond, *Jurisprudence*, p. 436; Wharton, *Criminal Law*, sec. 89.

[46] War was regarded as a legal procedure in ancient Rome when sanctioned with due formality by the Fecial College (Walker, *History of the Law of Nations*, p. 47). The Christian fathers found some difficulty in reconciling war with certain passages of the Bible, but doubts were set at rest with the publication of Gratian's *Decretal* (about 1140) in which Isidore of Seville (*Etymologie*, 600 A. D.) was followed in holding that war is not necessarily sinful and in distinguishing just from unjust wars. A series of writers followed with the similarity of treatment characteristic of medieval writing. They generally distinguished seven sorts of war, five unjust and two just, with a definition of the latter from Cicero through Isidore. "*Quod geritur expraedicto, aut rebus repetitis aut propulsandorum hostium causa.*" See T. E. Holland, *Studies in International Law*, pp. 40–58, who discusses the work of Legnano, *De Bello, de reprisalis et de duello*, 1360; Henry of Gorcum, *De bello justo, circa* 1450; Franciscus Victoria, *Relectiones, circa* 1540; Dominicus Soto, *De justitia et jure, circa* 1550; Vasquez, *Controversum illustrium, libri tres, circa* 1560; Pierino Belli, *De re Militari et de bello*, 1563; Balthazar Ayala, *De Jure et Officiis bellicis*, 1581 and others. The latter writes, "*Justa bella sunt jure gentium indicta*" (I, c. 2, sec. 6). Gentilis, who added much to the work of his predecessors, thinks that in last resort recourse may justly be had to war

of the criminal law was not unreasonable in an age when absolute monarchs had a real discretion in making war.[47] But as absolute monarchs became subject to constitutional restrictions, as international relations became more ramified, as the complexity of the antecedents of war became better realized, and as the scientific habit of looking for natural causes rather than for responsible agents gained ground among men of learning, international jurists despaired of allocating and judging responsibility for war, and viewed wars as events, the conduct of which could be regulated but the origin of which could not be judged. Historians, statesmen, moralists and propagandists continued to discuss the responsibility for and the justice of wars, but lawyers gave it up.[48]

During the past century, inventions and social organization, together with growth in population, have increased international trade, travel, communication and coöperation, with a consequent stimulation of humanitarian and cultural interest in other peoples, economic interest in their prosperity and political interest in their stability.[49] But, on the other hand, these same factors have perfected instruments of destruction, enlarged the possibility

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but "*Si necessitas non subsit, belle esse justum nec posit.*" (*De Jure Belli*, 1588, I, c. 3.) Grotius devotes a chapter to the question whether war is ever just, with the conclusion "*De jure naturali, ergo, quod et gentium dici potest, ratis constat eo bella non omnia improbari.*" (1625, I, c. 2, par. 4.) Not content with this, he proves at length that war is not prohibited by divine law as declared by the old or new testament or by the church. Pufendorf thinks "Peace is a state proper to human nature as such; since it ariseth from a principle peculiar to mankind above the brutes; whereas, war flows from principles common to both." But nevertheless man is entitled by nature "to defend himself or to recover his right by force when he cannot obtain it by easier means. When men are forced to fight, however, it is not because they are to make war perpetually, but that they may enjoy a lasting peace and security for the future." *Jus Naturale et Gentium*, 1672, viii, c. 6, sec. 2. Vattel's opinion is similar. (*Droit des gens*, 1758, iii, cl. 3.) All of these writers realized that this view required them to distinguish just from unjust wars, which they did on the ground both of formally just commencement and conduct and of substantively just causes. Among modern writers, Halleck follows the same practice with liberal citation from the classics, but apparently with the implication that the question is one of ethics rather than of law. (*International Law*, 4th ed., Chaps. 15, 16.) See also Kent who says, "An injury either done or threatened, to the perfect rights of the nation, or of any of its members, and susceptible of no other redress, is a just cause of war." (Abdy ed., 1866, p. 164). Martens, *Précis de droit des gens*, makes a similar statement (1788, viii, c. 2, sec. 3), as does Woolsey, *Introduction to the Study of International Law*, 1860, sec. 116. For the usual attitude of modern writers see *supra*, note 15.

[47] Grotius considers authorization by the sovereign an essential to just war, and sovereignty vested in a single individual as normal, though he recognizes the possibility of variation "according to the laws and custom of each nation." *Op. cit.*, I, c. 3, par. 4–8.

[48] *Supra*, note 16.

[49] This movement can be measured by comparison in successive periods of the number of public and private international organizations, agreements and settlements. See Potter, *Introduction to the Study of International Organization*, tables given on pages 190, 216, 226, 272, 291, 296, 323, and discussion of causes, p. 308. See also, Wright, this JOURNAL, Vol. 13, pp. 242–247.

of mobilizing whole populations, and increased the points of friction between nations, with the result of rendering preparation for war more expensive, war scares, if not wars themselves more frequent, and wars more destructive, particularly of civilian life and property.[50] The result has been an increasing demand for the elimination of war, a demand of which statesmen and international lawyers have taken cognizance, particularly during and since the World War.[51]

The past century has also witnessed advances in juristic thought. In the Middle Ages men thought there existed "a perfect body of law, immutable eternal, the work of God, not of man." Legislation was necessary only to reform procedure so that this law might be more perfectly applied.[52] Later, "natural law" was attributed, not to God, but to the nature of man, to geography and environment, to history and culture, but was equally beyond human control.[53]

[50] This tendency can be measured by comparison in successive periods of military appropriations and average size of standing armies and navies in time of peace, and number and cost of wars in expenditures and destruction of life and property. Such statistics are exceedingly difficult to compile and compare and are apt to be unreliable. See, however, report of Massachusetts Commission on Cost of Living, *The Waste of Militarism*, and the *Staggering Burden of Militarism*, World Peace Foundation pamphlets, Oct. 1912, April 1921, August 1921; Wright, *Limitation of Armament*, Institute of International Education, Syllabus 12, Nov. 1921; Anderson and Hershey, *Handbook of Diplomatic History*, 1870–1914, Washington, 1918, pp. 468–474; Krehbiel, *Nationalism, War and Society*, 1916, pp. 62, 70–74, 257; Bodart, *Losses of Life in Modern Wars*, 1916; Dumas and Vedel-Petersen, *Losses of Life Caused by War*, 1923; Moore, *International Law and Some Current Illusions*, pp. 8–13. The latter gives figures indicating that recent wars have not destroyed so large a proportion of the population of belligerent countries as earlier and ancient wars, but absolute losses have tended to increase, not only for equal times but for wars as a whole. The fact that wars have tended to be shorter perhaps indicates the more rapid exhaustion of belligerents. On the tendency of modern warfare see, Rear Admiral Rodgers, U. S. N., this JOURNAL, Vol. 17, pp. 1–14; Col. J. F. C. Fuller, D. S. O., *The Reformation of War*, N. Y., 1923; Will Irwin, *The Next War*, N. Y., 1921.

[51] Every great war has been followed by an extensive agitation for the elimination of war, and the relative strength of such demands is difficult to measure. Comparison of the proportionate amount of peace literature, and of the number and cost of private and public organizations devoted to this object, seem not to be available. Studies of the evolution of international organization and the extent of government participation in and delegation of functions to such organization seem to justify the statement given. See Sayre, *Experiments in International Administration*, Chap. 1; Potter, *op. cit.*, pp. 438–510; Fried, *Handbuch des Friedensbewegung*, 1913; Krehbiel, *op. cit.*, Chaps. 16–19, 28–30, giving extensive bibliographies.

[52] Maitland and Montague, *A Sketch of English Legal History*, 1915, p. 103.

[53] Natural law is here used in its widest sense as distinguished from artificial law in that its source is nature rather than human purpose. (See Ulpian, *Jus. Inst.* I, 2). It has also been distinguished from positive law in that its sanction is nature rather than enforcement by political authority (Holland, *op. cit.*, p. 31), and from civil law in that it is universal rather than limited to a special country. In this sense it is equivalent to *jus gentium* as understood in ancient Rome. (Cicero, *De Off.* 1, 23.) See also Pollock, *Introduction to the History of the Science of Politics*, 1908, p. 110.

This conception has to a considerable extent broken down before the assaults of the analytical jurists, the historians and the sociologists. Law has come to be looked upon as an artificial contrivance which not merely clarifies intuitions of justice but moulds society in accordance with social policies. Doubtless, the legislator must take cognizance of existing customs, interests and moral convictions of those subject to the law, but, nevertheless, with careful integration into the system and well conceived agencies of enforcement, he may make laws which will gradually modify them. Law can be an agency of progress as well as of stability.[54]

Modern jurists consequently have insisted that legal responsibility is an artificial creation which need not be related to subjective intuitions of fault or psychological investigations of intention, if better results can be obtained otherwise. According to Dean Roscoe Pound, modern systems of private law tend to enforce "reasonable expectations arising out of conduct, relations and situations" rather than "willed consequences of declared intentions" or "reparation for willed aggression."[55] Modern legal thought would therefore recognize the possibility of artificial criteria to determine legal responsibility for initiating wars—criteria which can be applied without attempting to solve insoluble historical disputes as to who is morally responsible for a particular war.

Thus with an insistent stimulus to action and new jural instruments offering a prospect of success, jurists have set about the task of controlling war. They have been met by the problems: (1) of devising criteria of responsibility for beginning war, (2) of devising criteria for determining justifiable acts of self-defense, and (3) of devising adequate agencies of enforcement.

[54] Pound, *Interpretations of Legal History*, 1923, pp. 11, 152 *et seq.*; Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, 1905, pp. 41–47; Maitland and Montague, *op. cit.*, pp. 161–162; Wright, *Legal Nature of Treaties*, this JOURNAL, Vol. 10, p. 707, Oct. 1916.

[55] Pound, *Introduction to the Philosophy of Law*, 1922, p. 189. The artificiality of the concept of legal responsibility is well illustrated by the efforts of the analytical jurists to define liability so as to include the various kinds of intentional wrong, negligence, and liability without fault known to the law, and to explain the relation of the act in question to the total causation of the effect attributed to it. See Holland, *op. cit.*, pp. 105, 149–151, 327; Salmond, *op. cit.*, pp. 401–403, 410–411.

EDITORIAL COMMENT

THE IMBRIE INCIDENT[1]

On Friday, July 18, 1924, during a religious ceremony, Major Robert Imbrie, American vice-consul at Teheran, was attacked and done to death by a fanatical mob that misunderstood or resented his presence. The outrage was peculiarly atrocious in that the mob after severely wounding Consul Imbrie pursued him into the operating-room of the hospital where he had been taken for relief and there pounded him to death.

The local police appear to have joined in the attack, or at any event not to have made any effectual resistance to the mob, and the responsibility of the Persian Government was in consequence more seriously involved. The Government of Persia recognized this responsibility at once and took action to fulfil her obligations as a sovereign state. Teheran was placed under martial law; measures were taken to prevent the publication of newspapers inciting to hatred against foreigners; the Megliis, the Persian Legislature in open session, declared its sorrow and profound horror at the crime and urged the government to pursue the investigation relentlessly.

From the cabled report of Mr. Kornfeld, American Minister at Teheran, it was learned that Khalosi Zodeh, a leading Mullah, with two hundred persons suspected of participating in the crime, had been arrested. In the same cable Minister Kornfeld further reported that the Minister for Foreign Affairs and representatives of the Crown Prince had called at the American Legation to express their condolences, and that he had asked the Persian authorities for a precise statement of the facts concerning Major Imbrie's death. Minister Kornfeld stated that Major Imbrie was buried on July 19, with full military honors, and that the diplomatic corps had made to the Persian Government a strong protest relative to the commission of the crime.

On July 21, the Persian Chargé d'Affaires, Mr. Bagher M. Kazemi, acting under the instructions of his government, called upon Mr. Grew, Acting Secretary of State in the absence of Mr. Hughes, and read the following official communication: "The Persian Government assures the United States Government that it will do everything in its power to fulfil its duties in a diplomatic sense. The Persian Government is appalled by the disaster and promises every aid to apprehend the slayers of Major Imbrie."

The Department of State in a communication to the press made public

[1] The discussion of this incident is based upon the facts as given out by the Department of State and the cabled press reports published in the *New York Times*.

the formal note of protest telegraphed to Minister Kornfeld on July 25 for presentation to the Persian Minister for Foreign Affairs. After the note was dispatched the Department learned of the attack upon the widow of Major Imbrie in the streets of Teheran and sent further instructions to Minister Kornfeld to make adequate oral representations on this account, but the nature of these supplementary instructions was not made public.

The text of the note of protest as communicated to the press was as follows:

> I am instructed to inform you that the Government of the United States views with the gravest concern the killing in Teheran of its consular representative, Mr. Robert W. Imbrie.
>
> Immediately after learning of the circumstances under which Mr. Imbrie had been killed and his attendant, Mr. Melvin Seymour, seriously injured, your Excellency's Government was advised, through its representative in Washington and through the American Legation in Teheran, that my Government would expect adequate reparation to be made and prompt punishment meted out to those responsible for the killing and to those who by their failure to act contributed to make possible this incident unprecedented in recent times.
>
> My Government has now instructed me to supplement the representations already made.
>
> It was felt proper that these representations should be made only in the light of a full knowledge of the events which had transpired and when it might be possible to fix the responsibility and to gauge the reparation which would be adequate to the situation.
>
> The facts of the case appear sufficiently established in so far as all essential elements are concerned. The American consular representative in Teheran, accompanied by an American citizen, was brutally assaulted in the streets of Teheran, in broad daylight. In endeavoring to escape from their assailants, they entered a carriage and drove a considerable distance, when they were again assailed and the tragedy occurred.
>
> The American consular representative would appear to have had no reason to anticipate danger from visiting the particular place where he was the victim of the unjustified assault.
>
> It is most regrettable that it is necessary to add to this statement that the facts before my Government do not indicate that the police or military authorities made any adequate effort to protect the American consular representative, and there appears, in fact, to be evidence which it is believed the Persian Government will itself desire to investigate most vigorously, that certain military elements participated in the assault.
>
> My Government desires nothing which the facts of the case do not fully justify. It approaches the situation with no wish to offend a friendly Government or to require punitive damages. It is, however, insistent that full reparation should be made, that punishment should be meted out to the guilty, that assurances be given and enforced of adequate protection for the lives of American citizens and that the safety of its officials in Persia should be guaranteed.
>
> My Government does not wish at this juncture to indicate in detail the particular steps which would be considered adequately to meet

the situation resulting from the killing of Mr. Imbrie. The Persian Government has already stated on its own initiative that redress for the wife of the victim would be made. This redress should also extend to the covering of the expenses which might be incurred in connection with the dispatch to a Persian port of an American man-of-war to receive the body of Vice Consul Imbrie, which should be accompanied while on Persian soil by a suitable Persian military guard of honor and rendered appropriate honors at the time of leaving Persian territory. It is further considered that an appropriate guard should, if requested by the Legation, be furnished by the Persian Government both to the American Legation and to the American Consulate, such guard to be maintained pending the notification to the Persian Government that it is no longer considered necessary.

My Government has further instructed me to reserve, for a later communication, further suggestions as to the action which may be considered necessary to meet the exigencies of the situation. I am instructed by my Government to add that the character of any additional statement which might be made to the Persian Government would be materially influenced by the action which that Government may immediately take on its own initiative to make such further redress as may be appropriate, particularly in punishing those responsible for the crime and in giving full publicity to the action taken.

The maintenance of relations between countries is primarily dependent upon the according of adequate protection to their respective nationals and to their official representatives. Diplomatic usage, treaty provisions, in fact the very provisions of the treaty between the United States and Persia of 1856, emphasize this view. This Government feels that the continuance of its diplomatic and consular representation in Persia will be dependent upon the action which the Persian Government may take in this case to vindicate this fundamental principle of international law and this foundation upon which international intercourse is predicated. It confidently awaits such action to supplement the steps already taken by the Persian Government. It cannot overemphasize the seriousness of the view which is taken of the present situation.

In reply the Persian Government on July 29, addressed the following note to Minister Kornfeld and made public through the Persian press an account of the promised reparation:

Pursuant to my letter No. 9458 I beg to advise your Excellency of the views of the Imperial Government in response to your note of July 25, 1924.

As your Excellency has observed, the Government and people of Persia are extremely chagrined and depressed by the lamentable incident of Friday, July 18, and have expressed their feelings to that effect in numerous instances and in various ways.

You state that Excellency's Government does not desire to approach the situation in such manner as to offend my Government The Persian Government regards this as an evidence of the unequivocal good will and friendship of the American Government, and requests your Excellency to be good enough to communicate its thanks and appreciation to the authorities of your great Government.

As I stated in the course of my letter No. 9155, the Imperial Government is making extreme efforts in pursuing and punishing the persons who caused and perpetrated the killing of Mr. Imbrie, and it will not hesitate to take any kind of steps in this connection. Up to the present time the action of the Government in pursuing this object has proceeded with rapidity. Many of the persons who were either suspected or were accused of committing the crime have, regardless of the class to which they belong, been arrested. Other persons who participated will shortly, as a result of the vigorous efforts of the Government, be apprehended and the culprits will receive drastic punishment after their trial.

I also feel it again necessary to give your Excellency the assurance that the Imperial Government is extremely desirous of repairing the above-mentioned regrettable incident.

Considering the official status of Mr. Imbrie, the deceased, the Persian Government agrees with the suggestion of the United States Government that the body of Mr. Imbrie be accorded honors during its transportation. The Persian Government is concerned over this matter to such an extent that it would ship the remains of the deceased Consul to America aboard a Persian man-of-war if Persia possessed one. But inasmuch as it is unable to do so it agrees to pay the expenses which may be incurred by the dispatch of an American man-of-war to receive the remains.

Your Excellency has already been advised verbally and in writing as to the Persian Government's desire to relieve and console the widow of the deceased Consul.

As to the security of American citizens, and particularly American official representatives, the Persian Government has always considered and will continue to consider this as its positive duty and gives assurance that it will by no means hesitate to fulfill this duty. It goes without saying that if the Honorable Legation deems it necessary the guards of the American Legation and Consulates will be increased.

I also beg to advise your Excellency of the fact that the Imperial Government has always made, and will make it in the future, an essential point to respect the principles of international law and the treaty on which the relations of the two Governments rest. I am hopeful that in view of the good will of the two parties and the Imperial Government's great desire to repair the incident and fulfill the points that are suggested there will remain no ground whatever for any anxiety on the part of the United States Government.

In accordance with the understanding reached through this exchange of notes, arrangements were made for the U. S. S. *Trenton* to proceed from Naples to Bushire, on the Persian Gulf, to receive there on August 25, from the Persian officials and guard of honor, the body of Major Imbrie, Vice-Consul of the United States at Teheran. In a telegram dated August 23rd, the American Minister at Teheran reported that the Persian Government had advised the Legation of its acquiescence in the payment of an indemnity of $60,000 to Mrs. Imbrie. After the arrival of Major Imbrie's body, memorial services were held in Washington, on September 29th. The President, the Secretary of State, and other high officials of the government

were present. The Persian *Chargé d'Affaires* officially represented his government at the ceremony. On October 1st the Persian Government delivered to the American *Chargé d'Affaires* in Teheran a check for $60,000 which will be turned over to Mrs. Robert W. Imbrie. In a despatch received the following day the Department of State was informed of the execution by a firing squad of Private Morteza of the Persian Army for the slaying of Major Imbrie. Charges which brought about the sentence of Morteza specified that he had "incited the mob to kill Vice Consul Imbrie, having disregarded the orders of Second Lieutenant Mustapha Khan and non-commissioned officer Mohamed Ali Khan who three times ordered him to desist and pulled him out of the mob and having nevertheless persisted in attacking." The execution was performed in the presence of the entire garrison of the Kasr Kadjar barracks.

From the point of view of international law the adequate redress so promptly furnished by the diligence of the Persian Government may well serve as an example of a substantial compliance with each requisite step of the procedure recognized by the practice of states as appropriate in such cases. The first step was the immediate action of the government and local authorities to prevent further outrages. The police regulations adopted in this instance consisted of the declaration of martial law and the bridling of the press. The next step was to conduct a thorough and impartial investigation of the facts. In some instances such an investigation is left to a commission composed entirely or in part of officials of third states.

While these measures are in course, or even before they have commenced, the local government should at the earliest opportunity formally express its regrets through the diplomatic channel and offer to make such redress as the investigation when completed should indicate as due. In the present instance this apology was appropriately given the widest significance and emphasis through publicity in the local press and by means of other expressions of popular or official sorrow and sympathy for the bereaved.

A formal and prompt demand for redress follows from the injured government. The nature of the redress demanded must of course be made conditional upon the facts as disclosed by the investigation. The protest or demand for redress should avoid any intimation of duress; no state is justified in assuming that a sister state will not of its own volition make adequate redress, and any intimation at this stage that constraint may be employed is a gratuitous insult which would go far toward justifying a refusal to make redress, which then takes on the aspect of a national humiliation. But when, as in the present instance, the government is weak and unable always sufficiently to police its territory in order to fulfill its obligations of a sovereign state, a strong statement of the gravity of the situation and the probable consequences of the outrage may be of assistance and enable the responsible government to take the steps requisite to afford adequate redress.

Viewed in this light, the strong terms of the American note were in no sense unfriendly to Persia. International law, based upon practice which is necessarily harmonized with the needs of international intercourse, can hardly refuse to justify language which helps to prevent a rupture of diplomatic relations by indicating the danger of such an event.

The formal acceptance of the reasonable terms of the demands for redress and compliance therewith completed the procedure and closed the incident.

Since the international law rules of procedure for the settlement of differences between states are based on the actual practice of states, these rules may be expected to prove effective except when one or other of the parties cherishes unavowed designs of aggression. The rupture or threat of rupture of diplomatic relations at the very moment when the appeasing and peaceful mission of diplomacy is most needed should ordinarily be condemned. But should the personal immunity of the representative be violated or his presence used to insult his nation, he can no longer act in his capacity of an agent of contact and serve a peaceful purpose. The cessation of relations is then the only course.

The protest of the diplomatic corps at Teheran is worthy of remark and is a happy instance of the growing tendency toward international coöperation to secure the observance of international law. Such action supports the protests of the injured state and at the same time emphasizes the gravity of the situation. The local government furthermore finds it easier to justify before its own people whatever expiatory measures it may adopt. After the diplomatic corps has lodged a vigorous protest the representatives of the Powers will be in a much better position to intervene when necessary to prevent a demand for redress from being turned into a pretext for aggression.

Article II of the treaty of friendship and commerce of December 13, 1856, referred to in the exchange of notes provides:

> The Ambassadors or Diplomatic Agents whom it may please either of the two high contracting parties to send and maintain near the other shall be received and treated, they and all those composing their missions, as the Ambassadors and Diplomatic Agents of the most favored nations are received and treated in the two respective countries; and they shall enjoy there, in all respects, the same prerogatives and immunities.

and the first paragraph of Article III provides:

> The citizens and subjects of the two high contracting parties—travellers, merchants, manufacturers, and others—who may reside in the territory of either country, shall be respected and efficiently protected by the authorities of the country and their agents, and treated in all respects as the subjects and citizens of the most favored nation are treated.

But treaty stipulations of this nature are generally no more than the record of existing international law obligations. Their function is to serve

as evidence and to facilitate the proof of the right or obligation rather than to create it. To quote the phrase of the note of protest, the provisions of the treaty of 1856 "emphasize" the existence of the international law obligation to afford adequate protection to the respective nationals and representatives of the high contracting parties.

The preamble of this same treaty describes the Shah as: "His Majesty as exalted as the planet Saturn; the Sovereign to whom the sun serves as a standard; whose splendor and magnificence are equal to that of the skies; the Sublime Sovereign, the Monarch whose armies are as numerous as the stars; whose greatness calls to mind that of Jeinshid; whose magnificence equals that of Darius; the heir of the crown and throne of the Kayanians; the Sublime Emperor of all Persia." It is interesting to compare this hyperbole of 1856 with the humble confession of the Persian note that "the Persian Government would ship the remains of the deceased consul to America aboard a Persian man-of-war if Persia possessed one." But by her diligent efforts to make amends and scrupulously to fulfil her international law obligations Persia in 1924, honors herself truly in deed.

ELLERY C. STOWELL.

REORGANIZATION AND IMPROVEMENT OF THE FOREIGN SERVICE

By an act of Congress passed at the last session the United States has followed the example of a number of European states since the war and provided for the reorganization of its foreign service. The act was passed after long discussion and it embodies recommendations made by various recent Secretaries of State, including Mr. Bryan, Mr. Lansing, Mr. Colby, and Mr. Hughes; by Mr Wilbur J. Carr, formerly Director of the Consular Service and now an Assistant Secretary of State; by the Hon. John W. Davis, former ambassador to Great Britain, and other persons interested in the reform of the foreign service. The author of the act was the Hon. John J. Rogers of Massachusetts, to whose deep interest and untiring zeal the passage of the law was mainly due.

For a long time complaints had been multiplying that our foreign service was no longer equal to the demands made upon it, nor its organization in harmony with the admitted standards of efficiency. Some tentative efforts had already been made at different times in the direction of improvement, but they by no means met the situation. By an executive order issued by the President in 1905 it was provided that vacancies in the office of secretary of embassy or legation should thereafter be filled by transfer or promotion from some branch of the foreign service or by appointment after examination of qualified persons from outside the service. This order marked the beginning of a much needed reform, but being only an executive order it was of course binding only on the President who issued

it. The order was followed by the act of 1906 for the reorganization of the consular service and in 1909 by another act providing for the reorganization of the Department of State.

These measures, while introducing some improvements, left others still unprovided for. In the first place, the foreign service was criticized for its inflexibility resulting from the rigid separation of the diplomatic and consular services, and for the lack of uniformity of salaries as among officials of corresponding rank in the two branches of the service. Thus a consul-general of Class I received a salary of $12,000 a year while a counselor of embassy, the corresponding grade in the diplomatic service, received a salary of only $4,000, which was the maximum salary for diplomatic officials below the rank of minister. Salaries in the consular service ranged from $12,000 down to $2,500, whereas those in the diplomatic service below the rank of minister ranged from $4,000 downward to $2,500. In consequence mainly of this disparity of pay, transfers of officials from one branch of the service to the other were impracticable, although it not infrequently happened that by reason of the special aptitude of an official in the one branch for service in the other, such transfers were highly desirable. Furthermore, the existing scale of salaries in the diplomatic service was so low that only persons possessing independent means were in fact eligible to appointment. This situation was not peculiar to the United States, for in England until very recently no one was eligible to appointment in the diplomatic service who did not possess a private income of £400 a year. The virtual limitation of appointments to men of wealth had long been the subject of criticism. President Taft in his address before the National Board of Trade on January 26, 1916, denounced the system as inconsistent with the ideals of democracy and declared that it was "the purest demagogy."

Other complaints were: inadequate allowances for traveling expenses, illiberal rules regarding leaves of absence, especially for officials in tropical and unhealthful countries, and the lack of retiring allowances for superannuated persons in the foreign service.

The new law undertakes to remove or attenuate these defects. It amalgamates the diplomatic and consular services into a common service, hereafter to be known as the "Foreign Service of the United States," and provides for a new and uniform salary scale with a substantial increase, the maximum being $9,000 instead of $4,000 as formerly. The two services are thus put on an interchangeable basis so that transfers may be made from one to the other whenever the interest of the service may be promoted thereby. The act further provides that all persons in the permanent foreign service below the grade of minister shall be appointed after examination and a suitable period of probation and may be assigned to duty at the discretion of the President either in the diplomatic or the consular branch of the service. It is also provided that they shall be subject to promotion on the basis of merit. For this purpose the Secretary of State

is required to report to the President from time to time with his recommendations the names of foreign service officials who by reason of efficient service have demonstrated special capacity for promotion to the grade of minister, as well as the names of officers and employees in the Department of State who have demonstrated special efficiency. It will be noted that these provisions relative to appointment after examination and promotion on the basis of merit do not apply to the higher posts such as ministers and ambassadors. These posts still remain as political appointments and presumably the incumbents will be changed whenever a new administration controlled by a different political party comes into power. In this respect the American foreign service will still be distinguished from that of most other countries. But legislative sanction, for the first time, of the principle of appointment after examination, of officials in the lower posts, and of their promotion on the basis of merit, even to the post of minister, represents progress for which we may well be thankful.

While no provision is made for increasing the salaries of ministers and ambassadors, the President is authorized to grant to diplomatic missions representation allowances out of any money appropriated from time to time by Congress.

Provision is also made for liberal allowances for traveling expenses and subsistence for foreign service officers who are detailed for duty away from their posts, for leaves of absence with traveling expenses of officers and their immediate families (especially liberal provisions for those residing at "unhealthful ports"), and for the establishment of a retirement and disability fund for officers in the service. This fund is created in part by a 5 per cent deduction from the basic salary of all foreign service officers eligible to retirement and partly by a contribution from the treasury of the United States. It is stated that eventually the cost to the government for the maintenance of the fund will be about 28 per cent, while the service itself will defray the other 72 per cent. The age of retirement is fixed at 65 years and the beneficiary must have rendered at least 15 years' service, but the President may in his discretion retain the officer on active duty for a further period not exceeding five years. The amount of the annuity depends upon the length of service and the annual basic salary for the ten years next preceding the date of retirement. In the case of retirement for disability, the fact of disability shall be determined by the report of a qualified physician or surgeon designated by the Secretary of State.

Finally the act abolishes the position of Director of the Consular Service, the salary of which is made available for an additional Assistant Secretary of State, the office of which is created by the new law.

The enactment of this law represents the most important advance yet made in the direction of elevating the foreign service of the United States to a level such as it occupies in other countries and such as has long been demanded by the best public opinion in this country. Unfortunately,

however, the provisions of the law, as stated above, apply only to the lower posts in the service, except as regards representation allowances. The positions of minister and ambassador lie outside the scope of the law. It is true that the Secretary of State is required to report to the President the names of secretaries, counselors and others who have demonstrated special capacity, for promotion to the grade of minister, but naturally there is no assurance that they will be promoted. Whether they will or not depends on the President. It is to be hoped that our Presidents in the future will see the advantage not only of promoting specially qualified experienced secretaries to ministerial posts, but also of rewarding competent ministers by advancing them to ambassadorships.

J. W. GARNER.

NATIONAL SECURITY AND INTERNATIONAL ARBITRATION

The most significant feature of the development of international arbitration during the past generation has been the gradual widening of the field of controversies to which the obligation to arbitrate should apply. The plan of a comprehensive agreement to arbitrate all disputes without restriction seemed at the time of the First Hague Conference the ideal of a far-distant millennium, and to many, indeed, not even an ideal, but an unwarranted restraint upon national progress. At the moment of present writing (September 17) the plan seems to have come within the range of practical possibilities and the Assembly of the League of Nations is discussing ways and means of giving it definite actuality.

So long as agreements to arbitrate were concluded only in the presence of a concrete dispute which diplomacy had failed to settle, no question was raised as to the nature of the national interests involved in the dispute. A boundary controversy could be arbitrated if the parties saw fit to do so, and the vital or non-vital character of the interests at issue did not figure in the agreement. Nor was there any question as to the "justiciability" of the matter under dispute. Any matter was justiciable when the parties had agreed to settle it by arbitration and had determined the principles to be applied by the arbitrators.

It was only when nations began to conclude the so-called "general treaties of arbitration," looking to the arbitration of future disputes, that the question arose as to the character of the cases that it might be feasible to agree in advance to arbitrate. Quite clearly, in a community of nations organized as it then was and advocating the principles which it then advocated, it would not do for a state to commit its most important interests to the keeping of a tribunal not under its direct control. When the proposal of a general treaty of arbitration was made at the First and again at the Second Hague Conference there was no thought that the obligation to

arbitrate should extend to more than a definitely limited group of cases. It will be remembered that the list of arbitrable matters voted upon by the First Commission of the Conference of 1907 related to interests of a negligible character, and that the advocates of compulsory arbitration welcomed the list only as evidence of the acceptance of a general principle. The opposition of Germany and Austria-Hungary defeated even this first step, and the conference was obliged to content itself with the famous *voeu* admitting "the *principle* of compulsory arbitration" and recommending that certain disputes, in particular those relating to the interpretation of treaties, *might* be submitted to compulsory arbitration without restriction.

Failing the conclusion of a general arbitration treaty at The Hague, the individual Powers resorted to separate treaties between themselves, following the example of the South American states during the last quarter of the nineteenth century. With but few exceptions these agreements all fell short of an absolute obligation. The Root treaties of 1908, after the model of the Anglo-French treaty of 1903, embraced questions of a legal nature or questions relating to the interpretation of treaties, but made exception of matters affecting the vital interests and the honor of the contracting parties. The proposed Taft treaties widened the field considerably by including differences "justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity," leaving non-justiciable matters outside the obligation.

With the establishment of the League of Nations and the appointment, in pursuance of Article 14 of the Covenant, of a committee to formulate a plan for the Permanent Court of International Justice, the old question arose as to the cases to which the obligation to arbitrate should extend. The Advisory Committee of Jurists drafted a plan in which the court was given jurisdiction over four groups of legal questions; but this proposal was rejected by the Assembly of the League, and in place of it an article was adopted limiting the jurisdiction of the court to the cases which might voluntarily be submitted to it. Provision was, however, made that individual states might accept the jurisdiction of the court as obligatory in respect to the four specified classes of cases. While the optional clause has been signed by a number of the smaller Powers, even in regard to them there still remain excluded from the obligation assumed any questions which might be regarded as "political."

What is at the root of the unwillingness of the leading states to pledge themselves to arbitrate all future disputes without exception? What are the "vital interests" which they feel it would be unwise to submit to the judgment of an arbitral tribunal or of a permanent court? The answers to these two questions will put to the test all the projects to "outlaw war" which have been so widely discussed of recent months. For it is clear that the conditions which have led states to provide a loop-hole of escape from the obligation to arbitrate are also the conditions which keep them from

renouncing altogether the right to make war should a particular emergency arise. The whole history of modern arbitration has been the history of attempts to outlaw war by narrowing the field within which it could be resorted to. Progress has been made by gradual elimination of the cases which appeared to involve the least sacrifice of national interests. The last step, the absolute outlawry of war, arbitration without exceptions of any kind, is the most difficult of all, in that it involves a new organization of international society and doubtless new principles of international relationships.

Foremost among the interests which states are intent upon safeguarding is obviously the protection of their national existence. To that end all foreign policies are primarily directed and whatever bears upon it, even remotely, assumes a gravity beyond its immediate importance. The case has been the same whether the component elements of the state have been homogeneous or heterogeneous in respect to national aspirations. Under the old order in existence in 1914 the protection of its national existence was left to each state and the community at large assumed no responsibility for the maintenance of peace. Under such circumstances no state could be expected to agree to turn over to an arbitral tribunal, however impartial its composition, a controversy in which matters bearing upon its self-preservation might be in any way involved. The United States, for example, regarding the Monroe Doctrine as bearing upon its national security, would have unhesitatingly rejected any suggestion of arbitration if an adverse decision of the tribunal might have the effect of weakening that barrier against attack.

But the right of national existence, in a community lacking any principle of collective responsibility and having no agencies for the maintenance of peace, became a very complex right, with ramifications extending into many aspects of national life. The size of a state's armaments for self-protection was a matter which the state could not permit to be questioned before an international tribunal, although it might appear to a neighboring state that armaments maintained for alleged self-defense had an aggressive character. Thus Germany would have promptly rejected in 1911 any suggestion of arbitrating the question whether the growing size of her fleet constituted a menace to Great Britain. Again, cases could occur in which the conditions of government in one state constituted a nuisance to another state and thereby affected its national peace. Thus the United States would have been unwilling to commit itself in advance to accept the decision of an arbitral tribunal on the point of determining whether the time had come to put an end to the nuisance of misgovernment in Cuba. Thus, also, Austria-Hungary rejected the suggestion of mediation in the exercise of its right to call Serbia to forcible account for the agitation which was being carried on in that country against the integrity of its legal dominions.

Moreover, the defense or conservation of national existence has been

intimately tied up with the extension of national commerce and the development of national industry. Here the problem assumes, doubtless, its most difficult form. In a community of nations organized (or unorganized!) on the basis of individual self-help the development of the economic life of the state is intimately connected with the power of the state to defend itself against attack. Material prosperity thus becomes, in the case of the leading Powers, a condition of national independence. But the material prosperity of the modern industrial state requires the possession of the necessary raw materials as well as markets for the sale of manufactured products, both of which extend the problem of national self-preservation far beyond the boundaries of the country. Thus Germany and France would have been unwilling to commit themselves in advance to arbitrate such a question as their relation to Morocco, each believing that the objects involved in the dispute, control over the mineral and other resources of the country, had a vital bearing upon their industrial welfare. Nor would Great Britain have considered for a moment the acceptance in advance of an obligation to arbitrate such a question as the demand of Germany for a "place in the sun," if the decision of the court were to infringe in any way upon Britain's control over her colonies.

How far would the assumption, such as is now being discussed at Geneva, by the nations as a body of a collective responsibility for the maintenance of peace and the establishment of agencies for its effective administration remove the chief obstacles to a general agreement of obligatory arbitration? The question cannot be answered with finality. Undoubtedly, if the leading states could be convinced that adequate protection for their national independence could be secured to them by an international guarantee of the League of Nations, they would be the more readily inclined to submit many questions to arbitration which in the past have been regarded as excluded under the caption of "vital national interests." Many of the smaller states have already come to believe that their best protection rests in the resort to arbitration rather than to the decision of arms, and their signature of the optional clause of the statute of the Permanent Court would indicate a willingness to go even further towards closing the loop-holes in their obligation to arbitrate. There still remains the obstacle that the Great Powers and a number of the smaller ones have interests which cannot be included under the heading of national security, in the sense of the proposed guarantee of the League of Nations, and yet which they consider too vital to leave to the decision of an international tribunal.

Justice is, after all is said, an essential condition of the adoption or permanence of an adequate system of law, and it is clear that under the complex conditions of international life which have developed out of the aggressive nationalism of the past there are many cases where the existence of injustice must make it hard for a state to bind itself to accept the *status quo* as a permanent condition of things. Perhaps the experience of the alternative

of war may help to restrain some hands. More hopeful, however, is the promise that the Assembly of the League of Nations may prove to be a public forum for the expression of alleged national wrongs and bring the power of public opinion to right grievances which have only a moral, not a legal basis. To speak in familiar terms, statute law must remedy the defects of the common law. It will be observed that the Covenant of the League of Nations leaves it optional to a state to resort to the regular procedure of arbitration or to bring its case before the Council or the Assembly of the League. Doubtless the latter procedure will be followed in cases where these political, as distinct from legal, questions are at issue. But it would lead us too far afield to speculate how far the League may in time undertake to right individual wrongs by the adoption of general international conventions. Sufficient for the day is the problem in hand. Security comes first; then other aspects of justice.

A like answer is to be given to the question whether certain matters, such as the regulation of national commerce or the exclusion of alien immigrants, which are now regarded by international law as "domestic questions," but which actually do cause friction between nations, may not in time be brought under the control of a general rule of law. At present, if a case involving such matters were to be presented to the Permanent Court, it could only dismiss the suit with the statement that the defendant could not be disturbed in the performance of a clearly legal act because of its injurious effect upon another state. There is, therefore, no need of a reservation of "domestic questions" from the jurisdiction of the Permanent Court or of the League. It is sufficient that certain questions be understood to be domestic ones, and the matter is settled. A future generation may be left to determine whether what has been a domestic question in the past may not henceforth be an international one.

C. G. FENWICK.

EXTRATERRITORIALITY IN CHINA

The present issue of the JOURNAL contains two enlightening articles dealing with the question of the abolition of extraterritoriality in China,[1] written respectively from the American and the Chinese viewpoint.

It is interesting and encouraging to note the general similarity of the approach of the two authors to their subject. Whatever their differences as to the causes and history of extraterritoriality, they are in agreement not only in holding that it is an unfortunate anomaly which ought to be abolished, but that it can be abolished in a manner which will conserve the rights of all concerned and benefit both the foreigner and the Chinese.

[1] "Extraterritoriality in China," by Charles Denby, *supra*, pp. 667–675; "Foreign Jurisdiction in China," by N. Wing Mah, *supra*, pp. 676–695.

They are further in agreement that abolition must be gradual and that no definite period for its accomplishment can be fixed since the necessary prerequisite of the abolition of the present extraterritorial system is the establishment of a Chinese judicial system capable not only in theory but in actual practice of administering even-handed and enlightened justice both to the Chinese and to the foreigner. As Mr. Mah observes: "Although humane and scientific codes, and properly organized tribunals, are indispensable instruments, . . . what China most urgently needs are competent administrators of the law." Neither Mr. Mah nor Mr. Denby venture to estimate how long it is likely to take to secure such administrators and actually put them to work. As Mr. Mah says: "It is entirely problematical as to when the native Chinese judges will command confidence and respect, especially in view of the transitory changes now taking place and likely to continue in China for some years to come;" while Mr. Denby observes: "Intelligently handled there is no inherent reason why we should not have after some decades a creditable administration in China of laws adapted to the requirements of Chinese and of the foreigners there resident."

Mr. Mah and Mr. Denby, however, are again agreed that a beginning should presently be made upon the gradual process of abolishing extraterritoriality, and further that the first step is the formulation and promulgation of satisfactory judicial codes by China. Says Mr. Denby:

> There would be needed a code founded on foreign judicial practice and covering the needs of foreign litigants of whatever nationality; then a system of courts to carry out the execution of this code; then a time of probation with foreign expert judicial cooperation in training the magistrates of these courts.

Mr. Mah's suggestions as to a *modus operandi* lie along the same lines, although they are more detailed. They are as follows:

> To sum up, it would seem that the following principles should govern the disposition of the abolition of extraterritorial jurisdiction in China: (1) the adoption by China of the necessary legal codes, to wit, a civil, a criminal, and a commercial code, a code of civil procedure and a code of criminal procedure; (2) the reorganization of the existing Chinese courts, particularly in localities where there are treaty ports; (3) the establishment of "mixed" courts as an integral part of the regular judicial system, conferring upon foreigners the full benefit of Chinese laws; (4) the appointment as Chinese judges and procurators of foreigners learned in the law and experienced in administration irrespective of nationality, and at the unfettered discretion of the Chinese Government; (5) the provision for gradual and progressive relinquishment of extraterritorial rights by the treaty states corresponding to the ascertained fitness of Chinese judiciary to exercise jurisdiction over foreigners; and (6) the conclusion of an international agreement embodying the solemn promise of the treaty states to surrender their extraterritorial rights immediately upon the fulfillment by the Chinese judiciary

of certain elemental and progressive tests of judicial proficiency, the agreement to come into force upon ratification of the major treaty states on the one hand, and China on the other.

The plans of other competent experts such as Professor Willoughby and Mr. M. T. Z. Tyau, which are quoted in Mr. Mah's article, however they may differ in detail, are of the same general nature, except that Mr. Tyau has attempted to suggest a time limit within which the gradual abolition of extraterritoriality might be completed.

There is, however, a further suggestion which it is believed is not referred to by Mr. Mah or Mr. Denby, or by the experts from whom they quote, which it is submitted points out a second step in the gradual process of doing away with extraterritoriality which should follow hard on the first step as to which the experts seem to be in agreement.

This proposed second step is the prompt putting into force, in every treaty court, of the new Chinese codes as soon as they have been examined and found satisfactory by the treaty Powers.

While the new Chinese codes are in various states of advancement, they all could, and doubtless would if there were adequate inducement, be rapidly perfected and made ready for formal promulgation. These codes could then be submitted to the various treaty Powers, preferably through the International Commission of Inquiry provided for by the Washington Conference when it shall be constituted. They should then be examined by the commission, not of course with a view to ascertaining whether or not their provisions are such as would have been recommended to China by the respective Powers, but whether they constitute a reasonable legal system under which foreigners could properly be asked to live and transact their business in China. It is probable that these codes would be found in general to measure up to this standard, at least with such amendments as might readily be suggested by the commission and accepted by China. The codes having been formally accepted by the treaty Powers and promulgated, the suggestion then is that by agreement of the treaty Powers they be promptly put in force in every treaty court in China. This suggestion first came to the attention of the writer in 1919, in an article by Mr. H. G. W. Woodhead, not a lawyer but a layman, long editor of the *Peking and Tientsin Times*.

In the course of a very interesting article upon the abolition of extraterritoriality, published in March, 1919, in connection with the discussions then going on in China in anticipation of the decisions to be reached in regard to China by the Peace Conference at Paris, Mr. Woodhead said:

> The problem as it presents itself to us is this: a variety of Foreign Tribunals—some, such as the British Supreme Court, and the American Court for China, presided over by experienced Judges; others, far more numerous, presided over by Consular officials—endeavour to administer the laws of their respective nations, as modified to suit local needs, in the Treaty Ports. The result cannot be considered satisfactory. Cases

> are within our recollection in which three criminals of different nationalities, associated in the same crime, had to be tried by three different courts, the law, and the penalty inflicted, being different in each case. And one can imagine the complexity of a civil action in which (say) a Japanese sued a British subject in connection with property in American hands. If Chinese Tribunals cannot be trusted to administer justice to foreigners, is not the logical alternative that all foreign Tribunals in this country should administer *the same law*—Chinese law? Providing acceptable Civil and Criminal Codes are forthcoming, that, it seems to us, would be the first step in the solution of the problem of extraterritorial jurisdiction. Not only would it simplify legal proceedings in which foreigners are concerned, in this country; it would found precedents and furnish a model, for the Chinese Courts of the future. It would abolish the complexities arising from the conflict of laws of the various Treaty Powers.[2]

Mr. Woodhead summarized the remainder of his plan for the abolition of extraterritoriality as follows:

> The adoption of this plan would result in the abolition of Extraterritoriality being divided into three phases: 1. Chinese laws (approved by the Treaty Powers) administered in Foreign cases by Foreign Judges, with Chinese Judges as spectators; 2. Foreign and Chinese Judges jointly trying such cases with equal powers, in accordance with Chinese law; 3. Chinese Judges trying such cases, with Foreign Judges acting as Assessors. The transition from Extraterritoriality to China's complete judicial emancipation would thus be accomplished by stages, during which a competent Judiciary could be trained, and sound precedents established. The disappearance from the Bench of the Foreign Judge, when it came, would not then involve a complete break in the Judicial administration, but merely the continuation of a system established, and built up, with foreign aid. The Chinese legal codes would have been tested, and remedied where found wanting.

It will be observed that these latter suggestions do not differ in principle from those of Mr. Mah and Mr. Denby, but it is submitted that Mr. Woodhead's suggestion, that once the Chinese codes are perfected they be immediately put into force in every foreign jurisdiction in China, is a fresh contribution to the subject under discussion which deserves the careful consideration of all those interested in the abolition of extraterritoriality in China, and particularly of the International Commission of Inquiry to be appointed under a resolution of the Washington Conference, with a view to recommending such improvements in China's administration of justice "as would warrant the several Powers in relinquishing, either progressively or otherwise, their respective rights of extraterritoriality".[3]

One great argument for the suggestion here made is that if it is sound it can be carried out with no greater delay than is necessary to perfect the new codes and secure their acceptance by the Powers, and the proposed

[2] The Peking Leader, March 6, 1919.

[3] Senate Document 126, 67th Congress, 2nd Session, p. 514.

International Commission of Inquiry provides convenient machinery for securing the approval of the Powers.

Further, there is no doubt that if China were given reason to hope that such a suggestion would be carried out it would be a great encouragement to exert every effort for the speedy perfection of the new codes. And once the plan was carried out and the codes were actually in operation in the treaty courts, it would again be a great encouragement and stimulus to the Chinese to show that they were capable of administering these same codes in their own courts. In other words, it is submitted that it would have a happy effect in putting an end to the present psychological impasse in which China is waiting for some tangible proof of the readiness of the Powers to abolish extraterritoriality before making serious efforts to improve her judicial system, and the Powers are awaiting serious efforts on the part of China to improve her judicial system before making any definite move in the direction of the abolition of extraterritoriality.

Moreover, it would at one blow and without waiting "for some decades," do away with one of the most serious, if not the most serious, objection to extraterritoriality from the point of view of the foreigner, namely, "the diversity, uncertainty and inadequacy of the laws applied by the consular courts of the various treaty states," which, according to Mr. Mah, constitutes "the first important indictment" against extraterritoriality. Once the codes were put into effect in all the treaty courts the foreigner when he goes to China would go there to live under the laws of China just as when he goes to England he goes there to live under the laws of England. The only difference would be that the laws of China would be administered by his own judicial officers. Thereafter, if a foreigner became involved in litigation in China his rights and his duties would be measured by Chinese law. It would no longer be true, as it is today, that his rights as a plaintiff vary according to the laws of the defendant's nationality while his duties are fixed by the laws of his own country.

Finally, as Mr. Woodhead has pointed out, the carrying out of this suggestion would not only not interfere with the carrying out of a comprehensive plan for the complete abolition of extraterritoriality, but it would be a great assistance in that direction.

If it be objected that the consular and other treaty courts would be called upon to administer a law with which they are unfamiliar, the answer would seem to lie first in the general advantages of the plan, and second, in the fact that many, if not most of the consular officers who preside in the consular courts of the various Powers are not lawyers and that their success or failure as judges in the future, as in the past, will depend upon their general good judgment and administrative ability rather than upon any technical learning in the law. And so far as the American Consular Service is concerned, the success which has been attained through the good sense and general high administrative ability of our consular officers in administering

American law in China as it is today, *i.e.*, a confused congeries of federal statutes, English common law, and judicially adopted territorial codes, gives every reason to believe that our consular officers would do at least as well in administering any reasonable scientific code.

With respect to courts such as the United States Court for China and H. B. M.'s Supreme Court for China, the experienced judges who preside in these courts could be trusted either to have or to speedily acquire the requisite facility in handling the Chinese codes which, like the Japanese codes, will doubtless owe much to the civil law and the codes of continental Europe.

In conclusion the prediction is ventured that in the very nature of things extraterritoriality in China is bound to go sooner or later as a result of evolution or revolution. The step suggested in this editorial is put forward as a modest installment on the evolutionary plan.

WILLIAM C. DENNIS.

TREATIES CONFERRING RIGHTS IN MANDATED TERRITORIES

On July 2, 1924, the President proclaimed two treaties signed with France on February 13, 1923, relating to rights in the French mandated territories of Cameroons and Togoland.[1] A similar treaty was made with Japan on February 11, 1922,[2] and Secretary of State Hughes has announced the policy of securing "fair and equal opportunities" in all the mandated territories.[3]

The first feature to strike attention is the year and a half interval between signature and proclamation. Apparently *The Federalist's* confidence that the constitution would permit greater "dispatch" in treaty-making has not been fully justified.[4]

The two treaties are practically identical. They recite the terms of the French mandates, "the United States consents to the administration" of the territory by France; the United States is accorded "the rights and benefits" enjoyed by members of the League of Nations under Articles 2 to 9 of the mandates; vested American property rights in the territories is not to be impaired; a duplicate of the annual report to the mandatory commission is to be sent to the United States; American rights under the treaty are to be unaffected by modifications of the mandate unless the United States shall have assented; and extradition treaties with France shall apply to the territories.

These treaties differ from the Japanese treaty of February 11, 1922, in some additions to the preamble, in the omission of provision for special

[1] Treaty Series (U. S.), Nos. 690, 691; Supplement, this JOURNAL, pp. 189 and 193.

[2] U. S. Treaties, 1910–1923, Vol. 3, p. 2723, and comments by C. N. Gregory, this JOURNAL, Vol. 15, pp. 419–427, Vol. 16, pp. 248–251.

[3] Address at Philadelphia, Nov. 30, 1923, *Current History Magazine*, Jan. 1924, p. 579, and address at New York, Jan. 23, 1924, this JOURNAL, Vol. 18, p. 243. See also notes appended to Japanese treaty, Feb. 11, 1922, U. S. Treaties, Vol. 3, p. 2728.

[4] *The Federalist*, No. 64 (Jay), No. 70 (Hamilton), Ford ed., pp. 429, 467.

protection to American missionaries, and of course, in the omission of the special articles with regard to American cable and radio rights in Yap. Furthermore, the Japanese treaty provided that "existing treaties between the United States and Japan shall be applicable to the mandated islands," whereas the French treaties provide only for such application of "extradition treaties and conventions." Thus Articles 7 and 12 of the French consular convention of 1853, which confer most favored national treatment with regard to consuls and national treatment with respect to private real and personal property rights and inheritances is not applicable in the Cameroons and Togoland. Treatment equal to that of Frenchmen in respect to personal and property rights and other privileges are, it is true, assured to nationals of League Members by Article 6 of the mandates in question, and, by the present treaties, to American citizens, but other privileges (apart from extradition) not thus specified in the mandates, which Americans now enjoy in France under treaty, would not be enjoyed by Americans in the mandated territories. In this respect, therefore, the United States gets less than it did under the Japanese treaty.

It should be noticed that the Japanese mandated islands fall in Class C under the League Covenant, to be "administered under the laws of the mandatory as integral portions of its territory," subject to specified safeguards for the benefit of the natives. Thus Japan probably has the right to extend all treaty privileges of foreign nations to them.[5] The covenant, however, does not appear to give so extensive powers to mandatories of Class B territories, like the Cameroons and Togoland. There might, therefore, be a question of the right of France as mandatory to extend all treaty privileges of foreigners to the territory. In fact, however, Article 9 of the mandates for these two territories does give the mandatory the right to administer them "as an integral part of his territory."

From the standpoint of international law the most interesting feature of these treaties is: (1) the assumption that American consent is necessary for French administration of the mandates and (2) the assumption that France can grant permanent rights with respect to the territories.[6]

QUINCY WRIGHT.

THE LEAGUE OF NATIONS' REPORT ON THE UNIFICATION OF THE LAW OF NEGOTIABLE INSTRUMENTS

The Conference of Financial Experts held at Brussels in September, 1920, recommended to the League of Nations as part of its scheme of financial rehabilitation "that the activities of the League might usefully be directed towards promoting certain reforms," the first of which was that

[5] Question might be raised whether, without the consent of the Council, she could exercise such sovereign powers as treaty-making with respect to mandated territory.

[6] Wright, "Sovereignty of the Mandates," this JOURNAL, Vol. 17, 699–700.

progress should be made toward the unification of the laws of the various countries relating to bills of exchange and bills of lading. The International Chamber of Commerce and other trade bodies have likewise strongly supported a resumption of initiative in this direction, which was interrupted by the war. As a result, the Economic Committee of the League of Nations, acting in coöperation with the Government of the Netherlands, and with the approval of the Council and the Assembly, appointed four legal experts to report their opinions upon the attitude now prevailing in the various countries of the world toward the work of the two Hague Conferences on Negotiable Instruments and also as to whether further action toward unification was likely to meet with practical success. The following highly qualified experts were charged with the task: Sir Mackenzie Chalmers, well known as the author of the English Bills of Exchange Act of 1882; the late Professor David Josephus Jitta, formerly Councillor of State of the Netherlands; Professor Franz Klein, of Austria, and Professor Lyon-Caen, the well-known French authority on commercial law.

It will be remembered that the unification of the law of bills and notes had advanced to the stage of the signing of a convention by representatives of twenty-seven nations in 1912. Two conferences at The Hague, in 1910 and in 1912, respectively, elaborated a *règlement* applicable to bills of exchange and promissory notes, which the nations signatory to the convention undertook to adopt as part of their national legislation. The convention failed of ratification mainly by reason of the war. Ratification by certain nations was delayed by the unfavorable attitude of Great Britain and the United States toward adhering to any scheme of unification which would involve material changes in the laws of their own jurisdictions. At the time of the conferences, it was thought possible to arrive at a scheme of unification in which countries of the Anglo-American sphere of jurisprudence might participate, but objections, partly of policy and partly constitutional, have induced both governments to withhold any hope of legislative approval.

Of course the Federal Government would not be likely to engage itself to recommend the adoption of any law which would substantially vary the system of the Uniform Negotiable Instruments Law elaborated after much labor and now in force in nearly all the States. Great Britain has never seriously considered the abandonment of the system developed through the Common Law and the Law Merchant as represented by its Bills of Exchange Act of 1882. It has, however, declared its willingness to consider such non-fundamental amendments as would aid in the process of unification.

The report of the experts of the League of Nations was presented to the Council in 1923, and its recommendations approved, though no action has yet been taken to execute the plan. The report recommends the acceptance of the convention and *règlement* of 1912, not as a finality, but as a

basis for further discussion at a conference to be called at The Hague to which all nations shall be invited and which shall be organized by the Government of the Netherlands acting in coöperation with the League of Nations. The report reflects an important change of opinion in so far that the inability of the Governments of United States and of Great Britain to hold out any hope of ultimate ratification on their part is no longer regarded as an impediment in the path of progress by the other nations. As the Uniform Negotiable Instruments Law varies so slightly from the system in force in Great Britain and in the British Colonies and Dependencies, the adoption of a uniform code for all other countries would leave only two great systems prevailing throughout the world, the Anglo-American and what, for lack of a better term, may be called the Continental System. This in itself would be a great advance and would make for certainty and stability in international and financial transactions. However, the committee of legal experts insists upon the importance of having the presence and coöperation of representatives of the Anglo-American group, with a view to coördination wherever possible. Sir Mackenzie Chalmers is of the opinion that the rules adopted in 1912 were already a closer approach to the Anglo-American system than any of the codes of the several countries of Continental Europe or of Latin-America. A "progressive assimilation" should, therefore, not be unthinkable, and the work of the proposed conference would then be one of consolidation of similar systems, with a tendency to approach the Anglo-American rules wherever practicable. In the words of the committee of experts, "It is wise to harvest that which is ripe and to allow to ripen that which is not."

ARTHUR K. KUHN.

DANISH LEGISLATION PROTECTING MINORITIES

An admirable illustration of both just and generous treatment of an alien minority is to be found in a brief pamphlet recently published by the Danish Ministry of Foreign Affairs, entitled: *The German Minority in South Jutland —A Summary of the Danish Legislation.*

It will be remembered that the Treaty of Versailles provided that the boundary between Germany and Denmark should be fixed in conformity with the results of a plebiscite to be taken in two separate zones, the more northern of which only was transferred to Denmark on that basis. Unlike the case of Poland, Czechoslovakia, and other states to which alien minorities were assigned, Denmark was not required by the Treaty of Versailles to enter into a separate treaty of guarantee defining the protection to be accorded to the German minority. This was due, the present pamphlet informs us, to the liberal character of the Danish legislation already in existence, which applied to all Danish subjects irrespective of language or nationality. This legislation was based upon the Danish Constitutional Act and

offered guarantees in respect to religious liberty, education, freedom of the press, and freedom of association and of assembly. Moreover, the system of proportional representation afforded a minority ample opportunity to secure just representation in the Danish Parliament. There are, therefore, in Denmark no minority laws in the strict sense, although a number of the older laws have been supplemented or modified to meet the special conditions arising from the transfer of northern Schleswig (South Jutland) to Denmark.

It is in the field of education that the chief difficulty in respect to the position of minorities arises. The Danish laws provide that in towns the elementary schools shall be divided into two sections, in one of which Danish is the language of instruction and in the other German, parents being given free choice between the two sections. Where Danish is the language of instruction a fixed number of lessons weekly is given in German, and *vice versa*, although it is not obligatory upon parents to have their children attend these lessons. In the country districts and boroughs the language of instruction depends upon the language of the particular school district, provision being made as in the towns for special lessons in the language which is not the language of instruction. The administration of these provisions is in the hands of local school committees elected by proportional representation, subject to the higher control of the national Ministry of Education. Thus there is a practical as well as a legal guarantee against unfair treatment. In addition, private schools may be conducted and, when conforming to the same standards of education, they may enjoy the same state grants as are given to the national schools. In respect to higher education provision is made that the older pupils may bring their elementary schooling to a normal close without changing the language of instruction. This is done by establishing special classes in German for those students who express a desire to finish their instruction in that language.

Owing to the fact that the German minority in Denmark shares the religious belief of the rest of the population, the protection of freedom of worship is limited to securing facilities for the conduct of religious services in German in the Danish national churches. In respect to legal procedure before the courts and the administration of the law in general, the fact that Danish is with few exceptions everywhere understood and spoken by the German minority makes it possible to have the proceedings conducted normally in Danish, resort being had to a public interpreter only where the party concerned gives an assurance that he is not familiar with Danish.

The minorities problem in Denmark is, indeed, a relatively simple one and does not involve many of the features which make the problem so difficult of solution in Central and Southeastern Europe. Nevertheless, the liberal character of the legislation put into effect in Denmark reflects credit upon the statesmanship of Denmark's rulers and upon the democratic spirit of the people.

C. G. FENWICK.

CURRENT NOTES

FOREIGN SERVICE REORGANIZATION ACT

It is a remarkable fact that although this country has been in existence something like one hundred and forty years, there has never previously been but a single act of Congress which provided for general reorganization of the foreign service. That law was enacted in 1856—nearly seventy years ago—and has naturally become as archaic as ordeal by battle.

When, on May 24 last, President Coolidge signed the bill for the reorganization and improvement of the foreign service of the United States he took the final legislative step in an effort that has been waged for seven years to put the diplomatic and consular agencies of the United States upon the highest possible plane of modern commercial and diplomatic efficiency.

"Why," asks the average American, "is the quality, either of personnel or of service rendered by our foreign officers, a vital matter to me?"

Chambers of Commerce, under the powerful leadership of the United States Chamber of Commerce, have recently been telling him why. Following up their explanation the great commercial bodies of the country have urged him to get behind the proposal for congressional reorganization of the foreign service. It is in an attempt to answer the queries as to the real value of such legislation from the standpoint of the practical man of affairs that I summarize the purposes and the proposals of the new act.

The foreign service of a nation is its first line of defense. Before armies and navies are requisitioned, before the decision as between peace and war has been arrived at, diplomacy has been diligently seeking a way out of the controversy. Skilled diplomacy is the greatest protector of peace. Bungling diplomacy is the most fertile cause of war. The weapons of diplomacy do not include engines of war or battleships. Diplomacy is man power, or, more accurately, the brain power of man power, and nothing else. A sagacious nation should strain every nerve, or go to almost any length, to secure the services of those among its population possessed of the maximum ability, of wide education and of long experience in the arts and practices of this highly skilled labor. As Walter Hines Page put it, "We should train the most capable male babies we have from the cradle."

The cost involved in our whole foreign service is, relatively speaking, a trifle. The burden upon the Treasury for the operation of the State Department, of the diplomatic service and of the consular service for the fiscal year which ended June 30, 1923, was $454,000.

I have recently been furnished the figures for the first half of the fiscal year 1924; that is, the figures for the period which ran from July 1, 1923, until January 1, 1924. They show that even the small burden upon the

Treasury for 1923 has been wiped out and that for the fiscal year 1924 the entire foreign service of the United States, including the administration thereof in Washington, was maintained without the necessity of raising a single dollar from the taxpayers of the United States. In fact, when detailed figures are available, the combined agencies will probably show more than a million-dollar profit. Of course, this showing results from the fact that the United States has taken the position, and I think has wisely taken it, that travellers and business men, whether Americans or foreigners, who seek to receive special service at the hands of our diplomats or consuls abroad should render appropriate payment for the service so rendered.

The new reorganization act will increase the budget for the foreign service by about $345,000 yearly. Does this additional item alarm any thoughtful man? When one considers that our foreign service is far-flung throughout the seven seas and that officers are maintained in 457 posts throughout the world, the additional commitment seems trifling indeed. The other day I read a description of a large coast defense gun on its way from Watervliet Arsenal in New York to its emplacement in Boston Harbor. It was stated that that one gun, with its carriage and emplacement, would cost something like two million dollars, four times and more the annual additional cost of giving us what will be the best foreign service which the United States has ever had, instead of the service of the recent past which has been merely a pretty good foreign service. I am not underestimating, I am sure, the value of the coast defenses of the nation. We must have proper defense; but if we can have the best foreign service that the country can provide, we are doing vastly more toward peace insurance than by multiplying the munitions of war.

Let us now consider some of the respects in which the new law seeks to achieve improvement.

(1) Always hitherto the diplomatic side of the service and the consular side have occupied separate, watertight compartments. There has been a minimum of contact, and practically no personnel exchange. Yet in our modern world almost every international question is partly diplomatic and partly commercial. Take such questions as tariffs, coal, seals, oil, and a score of others, and you have a mixed question involving national policies, diplomatic negotiations, and commerce. The more business a man knows the better diplomat he will be and the more international politics he knows the better consul he will be. On the other hand, a poor consul may quite conceivably make an excellent diplomat and, conversely, a poor diplomat make an excellent consul. The measure in question authorizes for the first time free interchange between the two sides of the service as the interests of the United States make appropriate.

A young man of 25, let us say, seeks to embark upon a diplomatic career. He has just been graduated from college and passes an excellent examination for the diplomatic corps. There can be no sounder practical education for

such a young man than to turn him for a few years into a consulate, where for the first time he will learn business methods, and where he will learn that worth-while foreign service is not exclusively an opportunity to shine in society. He will be a better man, a better American, and a better foreign service officer all his life because of the background of his experience in a consulate. The provision for interchange, then, is our first plank.

(2) The salary scale on the consular side has run from $3,000 up to $12,000. The maximum for diplomatic secretaries has been $4,000; and yet no one would wish to assert that the work of our counselor of embassy in London or Paris during the war was less valuable than that of the consul general. Still less would anyone wish to assert that a proper reward for the training and ability which the position required was represented by any such salary as $4,000. Suppose under the new interchangeability plan it was desired to send the consul general at London to be counselor at the embassy at Paris, a position certainly not less in importance. Hitherto this would have involved a reduction in salary from $12,000 to $4,000. Manifestly such a situation would be a complete bar to the exchange.

For reasons of fairness, in the first place, and in order to make the interchangeability feature workable, in the second place, the new law assimilates the two salary scales. It does this by creating a single "Foreign Service of the United States," in which every diplomat and consul is assigned to an appropriate class. The salary scale of the new service thus created ranges from $9,000 down to $3,000. A counselor of embassy and a consul general of the first class both reappear as foreign service officers of class 1 at a salary of $9,000. Abroad, however, the diplomat and consul will continue to be known as before and in accordance with the practice of other nations. Our new amalgamated foreign service is simply a domestic arrangement for purposes of salary classification and the ready facilitation of the interchange features. The average salary increase is about 15 per cent or 16 per cent.

I doubt whether any thoughtful inquirer will feel that a maximum salary of $9,000, which comes only to mature men after years of admirable service, is too high, especially when we consider the financial demands upon our representatives abroad. Many will say that the scale is too low; but when we reflect that the Secretary of State himself receives a salary of but $12,000 we must pause before undertaking to give what would be a really compensatory scale of salaries for men in the foreign field.

(3) John W. Davis told the Committee on Foreign Affairs that when he represented the United States in London, though living unostentatiously, with exchange in his favor and at a time when the financial demands upon him were at a minimum, he was nevertheless obliged to spend from his own pocket from $50,000 to $60,000 a year. "Now, of course," he said, "that is not fair." Yet it is true of practically every man representing our country abroad today.

We propose for the first time in the new law to make provision for at least a

portion of the expenses of representing this country worthily abroad. Our ambassadors and ministers do not entertain because it gives them pleasure, but because to do their duty by their country they must see people. If they stay at their desks they are little better than useless hermits. If they are entertained they must accept. And a man cannot always be entertained and never entertain.

Our principal rivals in world trade, the British, recognize this. They pay their ambassador at Washington a salary of $12,000. We pay our ambassador to London $17,500. But that is all he gets to defray every kind of expenditure. The British ambassador at Washington, on the other hand, has a suitable embassy building furnished him for his residence. In addition, he receives a representation allowance which brings his total emoluments up to just under $100,000.

The yearly appropriation of a suitable sum for representation allowance, for the first time contemplated in the new law, will be an excellent investment for the United States and it will be "fair."

The bill does not provide any increase in the actual salaries of our ambassadors or ministers. At a later date I hope it may be possible for Congress to embark upon a general program of acquiring embassies, legations and consulates in the cities of the world where these are most needed and would be most useful. But this program is not carried in the recent law.

(4) Our army and navy officers are retired on three-quarters pay, without any contribution by them. Our judges are retired on full pay without contribution. Our civil service employees are retired, subject to the requirement that they shall have paid in two and one-half per cent of their salary during their active service. There seems no reason why our foreign service officers only should be excluded from a retirement system. The new law provides such a retirement arrangement predicated, however, upon a concontribution of five per cent of salary. The contribution will make the retirement almost self-supporting. The contribution of the government will be 28 per cent and that of the men themselves 72 per cent.

Such a program will tend to keep in the service the best men who otherwise would feel compelled to provide for themselves and their families in old age by seeking more lucrative private employment. The plan also insures the retirement, without unfairness to them, of the superannuated who have given their life to the government, but who have passed the time of usefulness.

There are many other provisions in the law but perhaps I have said enough to indicate its theory. In a few words it is this: The broader the basis of selection of personnel, the better should be the caliber of that personnel; and the more attractive the service becomes, in respect to salary, opportunities for interesting service and retirement arrangements, the broader will be the selection basis.

JOHN JACOB ROGERS.

INSTITUTE OF POLITICS AT FURMAN UNIVERSITY

An Institute of Politics has been conducted at Furman University, Greenville, South Carolina, during the first two weeks of August. This Institute has, according to the announcement, been frankly modeled on the plan of the Williamstown Institute, but the lecturers and round table leaders have been Americans. The session has been very successful, considering the late announcement of its opening.

THE THIRD PAN AMERICAN SCIENTIFIC CONGRESS

On September 17, 1924, the Department of State announced the delegates who have been appointed to represent the United States in each of the nine sections of the Third Pan American Scientific Congress to be held at Lima, Peru, from December 20, 1924, to January 6, 1925. Dr. James Brown Scott, the Honorary Editor-in-Chief of the JOURNAL, has been appointed the delegate of the United States in the seventh section dealing with private, public and international law. Dr. Leo S. Rowe, the Director of the Pan American Union, has been appointed chairman of the delegation. The Honorable Charles Evans Hughes, President of the Society, has designated Dr. Scott and Dr. Rowe to represent also the American Society of International Law at the Congress.

MEXICAN CLAIMS COMMISSIONS ORGANIZED

General Claims Commission

The General Claims Commission, created under the General Claims Convention between the United States and Mexico, which was proclaimed on March 3, 1924, was organized in the City of Washington, on Saturday, August 30, 1924, at 10 o'clock A. M. At this formal organization meeting the Honorable Charles E. Hughes, Secretary of State of the United States, was present, and delivered an address of welcome to the Commission. The others present were: Hon. Manuel C. Tellez, Chargé d'Affaires of the Embassy of the United Mexican States; Dr. C. van Vollenhoven, the Presiding Commissioner; Hon. Joseph R. Baker, United States Commissioner; Hon. Genaro Fernandez MacGregor, the Mexican Commissioner, and the Joint Secretaries, Hon. Thomas A. Simpson, for the United States, and Hon. José Romero, for Mexico. Hon. Henry W. Anderson was present as Agent of the United States, accompanied by his Assistant, Hon. Clement L. Bouvé. Hon. Benito Flores, represented the Mexican Government as its Agent. Addresses of welcome were delivered by the various officials. Credentials were duly examined and accepted, and the Presiding Commissioner then declared the General Claims Commission to be duly organized in conformity with the provisions of Articles I and II of the General Claims Convention.

Informal conferences were subsequently held, at which drafts of the Rules

of Procedure were considered. At a formal meeting on September 4, 1924, the Rules of Procedure were adopted as of that date.

Within a few days following, Dr. van Vollenhoven and the various representatives of Mexico departed from Washington, to return in time for the next formal meeting of the General Claims Commission in Washington, on March 25, 1925.

Special Claims Commission

The Special Claims Commission, created under the Special Claims Convention between the United States and Mexico, which was proclaimed on February 23, 1924, was organized in the City of Mexico, at 11 A. M., Friday, August 22, 1924. Hon. Aaron Saenz, the Mexican Secretary of Foreign Relations, and the Hon. H. F. A. Schoenfeld, Chargé d'Affaires for the United States Embassy at Mexico, attended the conference. The full Commission, constituted by Dr. Rodrigo Octavio, Presiding Commissioner; Hon. F. Gonzalez Roa, Mexican Commissioner, and Hon. Ernest B. Perry, the United States Commissioner, were present, as were the Joint Secretaries, Hon. Noble Warrum, for the United States, and Hon. José Aspe Suinaga, for Mexico. Hon. Henry W. Anderson represented the United States as its Agent, with him being the Assistant to the Agent, Hon. Clement L. Bouvé. The Mexican Government was represented by Lic. Aquiles Elorduy, as its Agent, and Lic. Julio Garcia, Assistant Agent.

Hon. Aaron Saenz, opened the meeting with an address of welcome. Dr. Octavio responded, and addresses were also made by the other officials. After the examination of credentials, the Presiding Commissioner declared the Special Claims Commission as duly organized under the Special Claims Convention.

During informal conferences the Rules of Procedure were discussed and finally adopted on August 22, 1924, and the Commission adjourned on that date, to meet in Mexico City on the first Monday in January, 1925. The American Commissioner and the officials of the United States Agency departed from Mexico City on August 23, 1924.

CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD MAY 16-AUGUST 15, 1924

(With reference to earlier events not previously noted.)

WITH REFERENCES

Abbreviations: *Adv. of peace*, Advocate of peace; *B. I. I. I.*, Bulletin de l'Institut Intermediaire International; *Bd. of trade J.*, Board of Trade Journal (London); *Bundesbl.*, Switzerland, Bundesblatt; *Clunet*, Journal du droit international; *Cmd.*, Great Britain, Parliamentary papers; *Commerce Reports*, U. S. Commerce reports; *Cong. Rec.*, Congressional Record; *Contemp. R.*, Contemporary Review; *Costa Rica, Ga.*, La Gaceta; *Cur. Hist.*, Current History (New York Times); *D. O.*, Diario oficial (Brazil); *E. G.*, Eidgenossiche gesetzsammlung (Switzerland); *Edin. Rev.*, Edinburgh Review; *Europe*, L'Europe Nouvelle; *Evening Star* (Washington); *G. B. Treaty series*, Great Britain, Treaty series; *Ga. de Madrid*, Gaceta de Madrid; *G. U.*, Gazetta Ufficiale (Italy); *Guatemalteco*, El. Guatemalteco; *I. L. O. B.*, International Labor Office Bulletin; *J. O.*, Journal Officiel (France); *L. N. M. S.*, League of Nations, Monthly Summary; *L. N. O. J.*, League of Nations, Official Journal; *L. N. Q. B.*, League of Nations, Quarterly Bulletin; *L. N. T. S.*, League of Nations, Treaty series; *Lond. Ga.*, London Gazette; *Monit.*, Moniteur Belge; *Nation (N. Y.)*; *N. Y. Times*, New York Times; *Naval Inst. Proc.*, U. S. Naval Institute Proceedings; *P. A. U.*, Pan American Union Bulletin; *Press Notice*, U. S. State Dept. Press Notice; *Proclamation*, U. S. State Dept. Proclamation; *R. G. D. I. P.*, Revue Générale de Droit International Public; *Reichs G.*, Reichs-Gesetzblatt (Germany); *Rev. int. de la Croix-Rouge*, Revue international de la Croix-Rouge; *R. R.*, American Review of Reviews; *Temps*, Le Temps (Paris); *Times*, The Times (London); *Wash. Post*, Washington Post.

March, 1924

29 AUSTRIA—BELGIUM. Convention signed at Vienna in execution of Article 15 of convention of Oct. 4, 1920, relative to application of section III of part X (Economic clauses) of Treaty of Saint-Germain signed Sept. 10, 1919. Text: *Monit.*, May 23, 1924, p. 2692.

31 MEXICO—SPAIN. Copyright treaty signed at Mexico City. *P. A. U.*, July, 1924, p. 734.

April, 1924

4 ARGENTINA—VENEZUELA. Exchanged ratifications of arbitration treaty of July 22, 1911. *P. A. U.*, Sept., 1924, p. 947.

7 JAPAN—PERU. Treaty of Amity, Commerce and Navigation of March 20, 1895, extended till Dec. 31, 1924, by exchange of notes. *Commerce Reports*, June 23, 1924, p. 800.

24 AUSTRIA—ITALY. Treaty of April 6, 1922, regarding the "Istituto Ipotecario" at Innsbruck, promulgated in Italy. *G. U.*, June 2, 1924, p. 2099.

May, 1924

3 *to June 16* CHINESE EASTERN RAILWAY. On May 3, American Minister at Peking sent note to Chinese Foreign Minister referring to 13th Resolution of Washington Conference, relating to the Chinese Eastern Railway and requesting that China take note of its responsibility as trustee thereunder. Reply of June 16 addressed to American, Japanese and French Ministers, stated that since conclusion of Sino-Russian agreement, the two governments of China and Russia will deal with the question of the railway, in which only those two countries are concerned. *Press Notice*, June 18, 1924. *N. Y. Times*, June 19, 1924, p. 23.

4 DANZIG—POLAND. Three agreements signed in Danzig. (1) Right of Harbour board to contract loans. (2) Berne railway conference. (3) Application of Article 27 of Warsaw agreement of Oct. 24, 1921. Texts: *L. N. O. J.*, June, 1924, p. 890.

7 BULGARIA—CZECHOSLOVAKIA. Agreement signed whereby Bulgaria will purchase machinery and railroad equipment from Czechoslovakia and Czechoslovakia will purchase tobacco from Bulgaria. *Commerce Reports*, July 7, 1924, p. 49.

8 CZECHOSLOVAKIA—ICELAND. Provisional trade agreement signed at Prague. *Commerce Reports*, June 23, 1924, p. 800.

10–23 POLAND—SOVIET UNION. On May 10, Chicherin sent note to Poland on persecution of national minorities in Poland. Reply of Poland of May 15 rejected Soviet note as interference in internal affairs of Poland. Soviet counter-reply of May 23 dealt with action of Polish government in violating Paragraph VII of the Riga treaty. Summaries: *Russian Information*, May 31 and June 7, 1924. Polish reply of May 27 and Soviet response ending discussion made public. *Russian R.*, July 15, 1924, p. 38.

10 SOVIET UNION—SWEDEN. Trade agreement of March 15, 1924, became effective. *Russian R.*, July 1, 1924, p. 18.

12–20 LEAGUE OF NATIONS. MILITARY, NAVAL AND AIR COMMISSION. Met in Paris to examine draft convention on control of arms traffic prepared by Reduction of Armaments Commission. *L. N. M. S.*, May, 1924, p. 87.

13 BELGIUM—FRANCE. By exchange of notes, agreements regarding administrative regulations of convention of assistance of Nov. 30, 1921, were approved by both governments. Text of regulations: *Monit.*, June 18, 1924, p. 3104.

14–25 GERMAN REPARATIONS. Franco-British correspondence published. Text: *Times*, May 29, 1924, p. 10. *Adv. of Peace*, July, 1924, p. 437.

May, 1924

19 GERMANY—UNITED STATES. Ship-liquor treaty signed in Washington. *Wash. Post,* May 20, 1924, p. 1. *N. Y. Times,* May 20, 1924, p. 23.

19 *to June 18* GREAT BRITAIN—ITALY. Agreement for rectification of section of Eritrea-Sudan border, signed at Kassala, Dec. 26, 1922, approved by exchange of notes. *G. B. Treaty series,* no. 29 (1924) *Cmd.* 2222.

20–31 PERMANENT COURT OF INTERNATIONAL JUSTICE. On May 20, Senator Pepper submitted S. Res. 234, advising adherence of the United States to the Protocol of the Court. *Cong. Rec.* (*daily*), May 20, 1924, p. 9344. On May 26 and 31, majority and minority reports of the Senate Committee on Foreign Relations were presented to Congress. *68th Cong., 1st sess.* Senate Rept. 634.

22 FRANCE—ITALY. Exchanged ratifications of agreement relative to tariff on silk and silk manufactures, signed July 28, 1923. Text: *J. O.,* May 28, 1924, p. 4740.

23 HUNGARY—UNITED STATES. Act to authorize settlement of indebtedness of Hungary to the United States approved by President Coolidge. *Public* no. 128, 68th Congress.

24 FOREIGN SERVICE OF THE UNITED STATES. Act for reorganization and improvement of foreign service approved by President Coolidge on May 24. *Public.* no. 135, 68th Congress. On June 11, President Coolidge issued Executive Order prescribing rules and regulations for administering the foreign service on an interchangeable basis. Text: *Press Notice,* June 9, 1924.

26 GUATEMALA. Announced that permanent delegate to League of Nations had been appointed. *N. Y. Times,* May 27, 1924, p. 20.

26 *to June 30* IMMIGRATION RESTRICTION. Act to limit immigration of aliens into the United States approved by President Coolidge, on May 26. *Public.* no. 139, 68th Congress. Statement issued to the press by President Coolidge on May 26. *Wash. Post,* May 27, 1924, p. 4. Japanese government sent note of protest to United States on May 31 to which Secretary Hughes replied on June 16. Texts: *Adv. of peace,* July, 1924, p. 430. *Cur. Hist.,* July—Aug., 1924, *20*: 649 and 881. *Int. Conciliation,* Sept., 1924, no. 202. On June 30, President Coolidge proclaimed the quotas according to nationality in pursuance of the Immigration act. *Press Notice,* June 30, 1924.

27 *to July 21* ELECTRICAL COMMUNICATIONS CONFERENCE. Inter-American Electrical Communications Commission, provided for by Fifth International Conference of American states, met at Mexico City

May, 1924

on May 27 and on July 21 adopted a telegraph convention and two resolutions, signed by all delegations except that of the United States. One resolution recommended that conference be held in Rio de Janeiro in 1925 for purpose of approving and signing service regulations referred to in Article 26. The other provided that Mexican government be requested to draw up draft of regulations for use in the proposed Inter-American Conference. Text: *P. A. U.*, Sept., 1924, p. 861. *Press Notice*, Aug. 12, 1924.

28 BELGIUM—FRANCE. Exchanged ratifications of convention of July 26, 1921, relative to application to Belgians established in France of the war profits law of July 1, 1916. Text: *Monit.*, June 28, 1924, p. 3283.

28 CZECHOSLOVAKIA—ITALY. Treaty of alliance signed. Text in French: *Ga. de Prague*, May 31 and July 12, 1924.

28 *to July 8* MILITARY CONTROL COMMISSION. Conference of Ambassadors replied to German note of March 31 rejecting German contentions. Text: *Times*, May 31, 1924, p. 13–14. Herriot-MacDonald declaration of June 24 contained warning and advice. Text: *Times*, June 25, 1924, p. 14. German reply of June 30 to Ambassadors' note of May 28 and Franco-British declaration of June 24, accepted resumption of military control with three reservations. Text: *Times*, July 1, 1924, p. 15. *Europe*, July 5, 1924, p. 869. On July 8, Conference of Ambassadors sent reply to German note of June 30. *Times*, July 10, 1924, p. 13.

28 PANAMA—UNITED STATES. In accordance with Joint Resolution of Congress approved Feb. 12, 1923, President Coolidge issued proclamation abrogating as of June 1, the Taft agreement—a series of Executive orders issued between 1904 and 1911, providing a temporary modus vivendi to cover the period of construction of the Panama Canal. *Cur. Hist.*, July, 1924, p. 664. *Press Notice*, May 28, 1924.

30 CZECHOSLOVAKIA—LITHUANIA. Commercial treaty signed at Prague, April 27, 1923, ratified by Lithuania on Oct. 26, 1923, and by Czechoslovakia on May 30, 1924. *Commerce Reports*, Sept. 15, 1924, p. 683.

30 GREECE—SERBIA. Exchanged ratifications of convention of May 10, 1923, providing for free zone for Serbia at Saloniki. *Commerce Reports*, Aug. 25, 1924, p. 506.

30 NETHERLANDS—POLAND. Commercial treaty providing most-favored-nation treatment signed at Warsaw. *Commerce Reports*, July 7, 1924, p. 49.

May, 1924

31 CHINA—SOVIET UNION. Agreement on general principles for settlement of questions between the two countries and agreement for provisional management of Chinese Eastern Railway signed at Peking. Text: *Cur. Hist.*, Sept., 1924, *20*: 960. *Nation* (*N. Y.*) Oct. 8, 1924, p. 368. *Europe*, July 26, 1924, p. 960.

31 DOMINICAN REPUBLIC. President of Republic signed a thirty-year concession to the All-America Cable Company to land cables and to furnish international service with that country. *Press Notice*, June 2, 1924.

June, 1924

3 FRANCE—UNITED STATES. Exchanged ratifications of two conventions, signed at Paris, Feb. 13, 1923, relating to Togoland and the Cameroons (B mandate treaties). Text of treaties: *J. O.*, July 4, 1924, pp. 5946 and 5948. *U. S. Treaty series*, no. 690; supplement to this JOURNAL, pp. 189, 193.

3 ITALY—UNITED STATES. Ship-liquor treaty signed in Washington. Text: *Cong. Record* (*daily*), June 4, 1924, p. 10750.

6 CANADA—UNITED STATES. New liquor smuggling treaty signed at Washington. *N. Y. Times*, June 7, 1924, p. 15. Text: *Press Notice*, June 6, 1924.

6 CHINA—GERMANY. Economic agreement reached by exchange of notes. Text: *Nation* (*N. Y.*) Oct. 15, 1924, p. 426.

6 CZECHOSLOVAKIA—SERBIA. Exchanged ratifications of juridical convention. *Ga. de Prague*, June 12, 1924, p. 1.

6 PANAMA—UNITED STATES. Liquor-smuggling treaty signed at Washington. *Press Notice*, June 6, 1924. *P. A. U.*, Sept., 1924, p. 947.

7 FINLAND—JAPAN. Commercial treaty based on most-favored-nation principle signed at Helsingfors. *Commerce Reports*, Aug. 25, 1924, p. 505.

10 LITHUANIA—NETHERLANDS. Provisional commercial treaty signed at Kovno based on most-favored-nation principle. *Commerce Reports*, July 21, 1924, p. 186.

11 NICARAGUA—UNITED STATES. Agreement effected by exchange of notes according mutual most-favored-nation treatment in customs matters. *U. S. Treaty series*, no. 697.

11–17 LEAGUE OF NATIONS COUNCIL. Held 29th session at Geneva for discussion of reduction of armaments, the Serbo-Albanian frontier, question of Iraq etc. *L. N. O. J.*, July, 1924. *Cmd.* 2187.

June, 1924

13–26 SOUTH AFRICA—UNITED STATES. Reciprocal copyright agreement, effective July 1, 1924, concluded by proclamation of President Coolidge on June 26 and by Governor General of South Africa on June 13. *Press Notice*, June 28, 1924.

14 CHINESE INDEMNITY. Secretary Hughes and the Chinese Minister at Washington exchanged notes relating to Public Resolution 21 of the 68th Congress, for remission of Chinese indemnity, approved by President Coolidge on May 21. *Press Notice*, June 27, 1924.

16 GREAT BRITAIN—POLAND. Exchanged ratifications of treaty of commerce and navigation signed at Warsaw on Nov. 26, 1923. *G. B. Treaty series*, no. 26 (1924) *Cmd.* 2219.

16 *to July 5* INTERNATIONAL LABOR CONFERENCE. Held sixth session at Geneva and adopted recommendation concerning development of facilities for utilization of workers' spare time. Text: *I. L. O. B.*, July 15, 1924, supplement.

17 *to July 12* CHINA—SOVIET UNION. Exchanged notes relating to Russian Legation buildings in Peking. *Russian Information*, July 26, 1924, p. 62.

17 INTERNATIONAL COMMUNIST CONGRESS. Fifth conference opened at Moscow, with 500 delegates from all parts of world. *N. Y. Times*, June 18, 1924, p. 12.

18 DENMARK—SOVIET UNION. *De jure* recognition accorded Soviet Government by Denmark. *Press Notice*, June 19, 1924. *Russian Information*, June 21, 1924, p. 386.

18 FINLAND—SOVIET UNION. Five conventions signed at Helsingfors, covering railways, telephone, telegraph, posts, and exchange of archives. *Russian R.*, Aug. 1, 1924, p. 56.

18 GREAT BRITAIN—MEXICO. Diplomatic relations suspended, following note in reply to MacDonald's warning concerning persecution of British agent, H. C. Cummins. *Wash. Post.*, June 19, 1924, p. 1.

19 MONGOLIA. Minister of Foreign Affairs of Mongolia notified Soviet Union that a republic had been proclaimed. *Russian R.*, Aug. 1, 1924, p. 56.

21 ECUADOR—PERU. Protocol submitting boundary dispute to the United States for arbitration was signed at Quito, providing for meeting of delegates in Washington, after decision in Tacna-Arica question has been rendered. *P. A. U.*, Sept., 1924, p. 947.

21 FINLAND—GREAT BRITAIN. Agreement in regard to reciprocal recognition of tonnage measurement certificates of British and Finnish ships signed at Helsingfors. Text: *G. B. Treaty series*, no. 30 (1924) *Cmd.* 2231.

June, 1924

24 BULGARIA—UNITED STATES. Exchanged ratifications of extradition treaty of March 19, 1924. *U. S. Treaty series*, no. 687.

24 COSTA RICA—UNITED STATES. Exchanged ratifications of commercial traveler's convention. Text: *U. S. Treaty series*, no. 688.

24 SWEDEN—UNITED STATES. Treaty of arbitration signed in Washington to replace that which expired on Aug. 18, 1918. *Press Notice*, June 24, 1924.

27 GREAT BRITAIN—SPAIN. Agreement regulating the treatment of companies signed at Madrid. Text: *G. B. Treaty series*, no. 25 (1924) *Cmd.* 2212. *Ga. de Madrid*, July 3, 1924.

30 FRANCE—UNITED STATES. Ship-liquor treaty signed in Washington. *N. Y. Times*, July 1, p. 25. *Press Notice*, June 30, 1924.

July, 1924

1 UNIVERSAL POSTAL CONGRESS. Opened in Stockholm. *Union postale*, Sept. 1, 1924, p. 129.

2 LATVIA—NETHERLANDS. Commercial treaty signed at Riga providing reciprocal most-favored-nation treatment. *Commerce Reports*, Sept. 8, 1924, p. 627.

2 MEXICO—UNITED STATES. Department of State announced appointments to General Claims Commission under Convention of Sept. 8, 1923, and Special Claims Commission under Convention of Sept. 10, 1923. *Press Notice*, July 2, 1924. See note in this JOURNAL, *supra*, p. 795.

2 NORWAY—UNITED STATES. Exchanged ratifications of ship-liquor treaty, signed May 24, 1924. Text: *U. S. Treaty series*, no. 689; supplement to this JOURNAL, p. 197.

3 PERSIA—SOVIET UNION. Commercial treaty signed at Teheran granting reciprocal most-favored-nation treatment. *Commerce Reports*, Sept. 8, 1924, p. 627. *Russian R.*, Aug. 15, 1924, p. 76.

4 BELGIUM—CANADA. Commercial treaty, with most-favored-nation clause, signed in Ottawa. *Times*, July 5, 1924, p. 13. *Commerce Reports*, Aug. 4, 1924, p. 314.

7–12 LEAGUE OF NATIONS. REDUCTION OF ARMAMENTS COMMISSION. Held 10th session at Geneva to prepare draft convention on international control of the traffic in arms and munitions. *L. N. M. S.*, July, 1924, p. 127. *Times*, July 13, 1924, p. 3.

8 PERU—UNITED STATES. Exchanged ratifications of commercial traveler's convention signed Jan. 19, 1923. Text: *U. S. Treaty series*, no. 692.

July, 1924

10 DENMARK—NORWAY. Treaty regarding East Greenland came into force. *Cur. Hist.*, Sept., 1924, *20*: 1045.

10 MUTUAL GUARANTEE TREATY. Secretary Hughes' reply to request from League of Nations for views as to draft treaty made public. Text: *N. Y. Times*, July 11, 1924, p. 1.

11–12 LITTLE ENTENTE CONFERENCE. Czechoslovakia, Serbia and Rumania met in conference at Prague. *Cur. Hist.*, Aug., 1924, *20*: 880. *Contemp. R.*, Aug., 1924, p. 248.

12 DOMINICAN REPUBLIC—UNITED STATES. American occupation ended, with evacuation of United States marines, in accordance with agreement of evacuation entered into on June 30, 1922. *Wash. Post.*, July 13, 1924, p. 1. New constitution of Dominican Republic promulgated as of July 13. *Press Notice*, July 8, 1924.

12 NICARAGUA—UNITED STATES. Agreement effected by exchange of notes for mutual most-favored-nation treatment with respect to customs duties and other commercial charges. Text: *Press Notice*, July 12, 1924.

12 RUSSIAN PROPERTY. Note presented by Powers to China warning her that Russian property must not be returned except to trusted agency. *Press Notice*, July 14, 1924. *Wash. Post.*, July 15, 1924, p. 10.

12 TANGIER CONVENTION, PARIS, DEC. 18, 1923. Secretary Hughes replied to identic note transmitted by British, French and Spanish governments, asking approval of Tangier convention. He pointed out objectionable features of the plan for internationalizing the Tangiers Zone, requested that rights of American citizens be respected, and rejected proposal that United States have a representative in the legislative assembly set up under the convention. *N. Y. Times*, July 13, 1924, p. 4.

14 GREAT BRITAIN—JAPAN. Exchanged notes respecting abrogation of Article 8 of the Treaty of Commerce and Navigation of April 3, 1911. *G. B. Treaty series*, no. 31 (1924) *Cmd.* 2230.

14 ITALY—SERBIA. Commercial treaty signed based on reciprocal most-favored-nation treatment. *Commerce Reports*, July 28, 1924, p. 249.

15 JAPAN. Government bill revising nationality law and abolishing "dual nationality" passed by both houses of the Diet. *Wash. Post.*, July 16, 1924, p. 1.

16 PERMANENT COURT OF INTERNATIONAL JUSTICE. Met in ordinary session at The Hague with three questions on the case list: the Mavromatis Palestine concessions, a legal point in connection with

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question of Serbo-Albanian frontier in the district of St. Naoum, which has been referred to the Court by the Council, and a Greco-Bulgarian dispute submitted to the Court in accordance with an arbitration agreement. *L. N. M. S.*, June and July, 1924.

16 *to Aug. 16* GERMAN REPARATIONS. Conference of Allied governments, and United States, opened at London July 16 to consider application of Dawes plan. German delegates arrived Aug. 5. Final protocol and four agreements initialled Aug. 16, subject to formal signature by Aug. 30, containing undertakings by all interested parties to put Dawes plan into execution. *N. Y. Times*, Aug. 17, 1924, p. 1. Text of communiqué concerning call of conference: *Wash. Post.*, June 23, 1924, p. 1. Correspondence concering Allied conference published. *Cmd.* 2184. *N. Y. Times*, July 9, 1924, p. 6. Text of protocol and agreements: *Europe*, Aug. 23, 1924, p. 1089. *Times*, Aug. 18, 1924, p. 10. *Cur. Hist.*, Oct. 1924, *21*: 155.

18 HONDURAS—UNITED STATES. United States notified General Tosta, temporary president of Honduras after recent revolution, that this government will not recognize any Honduran government headed by revolutionary leader. *Wash. Post.*, July 19, 1924, p. 1.

18 POLAND—SOVIET UNION. Consular convention signed at Moscow. *Russian R.*, Sept. 1, 1924, p. 93.

23 IRISH FREE STATE—UNITED STATES. Correspondence exchanged in June between Secretary Hughes and Ambassador Howard concerning appointment of Minister from Ireland made public. *N. Y. Times*, July 24, 1924, p. 14. *Press Notice*, July 23, 1924.

25 DENMARK—UNITED STATES. Exchanged ratifications of ship-liquor treaty signed May 29, 1924. *U. S. Treaty series*, no. 693; supplement to this JOURNAL, p. 186.

25 GERMANY—SPAIN. Commercial "modus vivendi" arranged by exchange of notes. *Ga. de Madrid*, July 31, 1924, p. 585.

29 BELGIUM—FRANCE. Conditions of agreement providing for direct telegraphic communication between Belgian Congo and Uganda accepted by both countries in exchange of notes. Text: *G. B. Treaty series* no. 33 (1924) *Cmd.* 2242.

29 GERMANY—SOVIET UNION. Protocol covering adjustment of controversies signed at Berlin. Text: *Russian R.*, Sept. 1, 1924, p. 92. *Russian Information*, Aug. 9, 1924, p. 94.

31 REPARATION PAYMENTS. Reparation Commission issued statement of what Germany had paid up to July 1, 1924. *N. Y. Times*, Aug. 1, 1924, p. 1.

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6 FRANCE—LUXEMBOURG. Exchanged ratifications of treaty of assistance signed at Luxembourg, Jan. 4, 1923. *J. O.*, Aug. 31, 1924, p. 8065.

7 CZECHOSLOVAKIA—GERMANY. Trade agreement, recently concluded, came into force. *Times*, Aug. 2, 1924, p. 9.

7 FRANCE—NORWAY. Protocol interpretative of the convention of April 23, 1921, relative to wines and intoxicating liquors, signed at Paris. Text: *J. O.*, Sept. 11, 1924, p. 8358.

8 GREAT BRITAIN—SOVIET UNION. General Treaty and Treaty of Commerce and Navigation signed in London. Text: *Europe*, Aug. 30, 1924, p. 1146. *Russian Information*, Aug. 16, 1924, p. 101. *Russian R.*, Sept. 15, 1924, p. 114. *Times*, Aug. 9, 1924, p. 10.

11 CHINA. The Ministers of the United States, France, Great Britain and Japan at Peking sent joint note to Chinese Minister for Foreign Affairs regarding obligations of Chinese government to protect loss of life and property to members of the foreign community at Shanghai in event of an outbreak of hostilities. Text: *Press Notice*, Aug. 30, 1924.

11 GERMANY—UNITED STATES. Exchanged ratifications of ship-liquor treaty, signed May 19, 1924. *U. S. Treaty series*, no. 694.

14 GUATEMALA—UNITED STATES. Agreement effected by exchange of notes, according mutual most-favored-nation treatment in customs matters. *U. S. Treaty series*, no. 696.

INTERNATIONAL CONVENTIONS

AERIAL NAVIGATION. Paris, Oct. 13, 1919. Protocol, Paris, May 1, 1920.
Ratification:
Rumania. May 31, 1924. *Monit.*, July 19, 1924, p. 3646.

AGRICULTURAL WORKERS' ASSOCIATIONS. Geneva, Nov. 12, 1921.
Ratification:
Austria. June 6, 1924.
Irish Free State. June 18, 1924.
Poland. June 23, 1924. *I. L. O. B.*, July 15, 1924.

AGRICULTURE, INTERNATIONAL INSTITUTE OF. Rome, June 7, 1905.
Adhesion:
Philippine Islands, Hawaii, Porto Rico, Virgin Islands. *Monit.*, June 4, 1924, p. 2888. *E. G.*, June 4, 1924, p. 275.

ARBITRATION CLAUSES PROTOCOL. Geneva, Sept. 24, 1923.
Signatures:
Finland. May 2, 1924. *L. N. O. J.*, June, 1924, p. 827.

Japan. Mar. 15, 1924.
Monaco. Mar. 29, 1924.
Netherlands. Mar. 31, 1924.
Rumania. Mar. 6, 1924. *L. N. O. J.*, May, 1924, p. 750.

CENTRAL AMERICAN TREATY FOR AGRICULTURAL EXPERIMENT STATIONS. Washington, Feb. 7, 1923.
Ratification:
Salvador. April 30, 1924. *P. A. U.*, Aug., 1924, p. 837.

CENTRAL AMERICAN TREATY FOR COMMISSIONS OF INQUIRY. Washington, Feb. 7, 1923.
Ratification:
Guatemala. May 24, 1924. *P. A. U.*, Aug., 1924, p. 837. *N. Y. Times*, May 27, 1924, p. 8.

CENTRAL AMERICAN TREATY FOR ESTABLISHMENT OF PERMANENT COMMISSIONS. Washington, Feb. 7, 1923.
Ratification:
Salvador. April 30, 1924. *P. A. U.*, Aug., 1924, p. 837.

CENTRAL AMERICAN TREATY OF PEACE AND AMITY. Washington, Feb. 7, 1923.
Ratification:
Guatemala. May 24, 1924. *P. A. U.*, Aug., 1924, p. 837.
Nicaragua. June 21, 1924. *Cur. Hist.*, Aug., 1924, 20: 844.

CENTRAL AMERICAN TREATY ON LIMITATION OF ARMAMENTS. Washington, Feb. 7, 1923.
Ratification:
Guatemala. May 24, 1924. *P. A. U.*, Aug., 1924, p. 837. *N. Y. Times*, May 27, 1924, p. 8.

CENTRAL AMERICAN TREATY ON PRACTICE OF LIBERAL PROFESSIONS. Washington, Feb. 7, 1923.
Ratification:
Salvador. April 30, 1924. *P. A. U.*, Aug., 1924, p. 837.

COPYRIGHT UNION. Revision. Berlin, Nov. 13, 1908.
Adhesion:
Syria and Lebanon. *E. G.*, Aug. 27, 1924, p. 388.

CUSTOMS DOCUMENTS. Santiago, May 3, 1923.
Ratification:
Costa Rica. June 25, 1924.
Paraguay. June 5, 1924. *Commerce Reports*, Aug. 18, 1924, p. 447.

CUSTOMS FORMALITIES. Geneva, Nov. 3, 1923.
Ratification:
Denmark. May 17, 1924. *L. N. O. J.*, June, 1924, p. 827.

Italy. May 4, 1924. *G. U.*, July 18, 1924, p. 2611. *L. N. O. J.*, Aug. 1924, p. 1034.

Signatures:

Japan. March 17, 1924.
Netherlands. Feb. 14, 1924.
Poland. March 31, 1924. *L. N. O. J.*, May, 1924, p. 749.
Czechoslovakia. May 8, 1924.
Denmark. April 23, 1924.
Hungary. April 29, 1924.
New Zealand. May 12, 1924. *L. N. O. J.*, June, 1924, p. 827.

CUSTOMS TARIFFS. Publication. Brussels, July 5, 1890.

Adhesion:

Luxemburg. *Monit.*, Aug. 22, 1924, p. 4245. *E. G.*, Aug. 27, 1924, p. 390.

EIGHT-HOUR DAY. Washington, Nov. 28, 1919.

Ratification:

Austria. June 6 1924, *I. L. O. B.*, July 15, 1924.

ELBE NAVIGATION. Dresden, Feb. 22, 1922. Additional Protocol. Prague, Jan. 27, 1923.

Text: *G. B. Treaty series*, no. 17 (1924) *Cmd.* 2091.

Ratifications deposited:

Italy. March 31, 1923.
Belgium, France, Great Britain. Dec. 29, 1923.
Czechoslovakia. Dec. 30, 1923.
Germany. Dec. 31, 1923. *Monit.*, Mar. 6, 1924, p. 1102.

EMPLOYMENT OF CHILDREN AT SEA. Genoa July, 9, 1920.

Ratification:

Italy. March 20, 1924. *G. U.*, May 6, 1924, p. 1694.
Denmark. May 10, 1924.
Japan. April 23, 1924.
Poland. June 11, 1924.
Spain. June 7, 1924. *I. L O. B.*, July 15, 1924.

EMPLOYMENT OF CHILDREN IN AGRICULTURE. Geneva, Nov. 16, 1921.

Ratification:

Austria. June 6, 1924. *I. L. O. B.*, July 15, 1924, p. 144.
Italy. Mar. 20, 1924. *G. U.*, May 5, 1924, p. 1674.
Japan. Dec. 19, 1923. *I. L. O. B.*, Mar. 31, 1924.
Poland. *I. L. O. B.*, July 15, 1924.

EMPLOYMENT OF CHILDREN IN INDUSTRY. Washington, Nov. 28, 1919.

Ratification:

Belgium. April 11, 1924. *Monit.*, Sept. 3, 1924, p. 4437.
Italy. Mar. 20, 1924. *G. U.*, May 6, 1924, p. 1693.
Poland. *I. L. O. B.*, July 15, 1924.

EMPLOYMENT OF YOUNG PERSONS AS TRIMMERS AND STOKERS. Geneva, Nov. 11, 1921.

Ratification:

Italy. Mar. 20, 1924. *G. U.*, May 5, 1924, p. 1674.
Denmark. May 10, 1924.
Poland. June 11, 1924.
Spain. June 7, 1924. *I. L. O. B.*, July 15, 1924.

EMPLOYMENT (FINDING) FOR SEAMEN. Geneva, July 10, 1920.

Ratification:

Poland. *I. L. O. B.*, July 15, 1924.

FALSE INDICATION OF ORIGIN OF GOODS. Madrid, Aug. 14, 1891. Revision. Washington, June 2, 1911.

Adhesion:

Syria.
Lebanon. *E. G.*, Aug. 27, 1924, p. 388.

FOOD ANALYSIS STATISTICS. Paris, Oct. 16, 1912.

Ratification deposited:

Norway. Sept. 1, 1924. *J. O.*, Sept. 3, 1924, p. 8138.

FREEDOM OF TRANSIT. Barcelona, April 20, 1921.

Adhesion:

Germany. April 9, 1924. *L. N. O. J.*, June, 1924, p. 827.

Ratification:

France. May 31, 1924. *J. O.*, June 1, 1924, p. 4906.
Greece. Feb. 18, 1924.
Japan. Feb. 20, 1924. *L. N. O. J.*, May, 1924, p. 749.
Netherlands. April 17, 1924. *L. N. O. J.*, June, 1924, p. 827.

GERMAN PEACE TREATY. Versailles, June 28, 1919. Amendment to Article 393, Oct. 18–Nov. 3, 1922.

Ratification:

Finland. Mar. 25, 1924.
Norway. April 8, 1924.
Siam. Mar. 18, 1924. *L. N. O. J.*, May, 1924, p. 821.
Denmark. June 8, 1924.
Sweden. April 25, 1924. *L. N. O. J.*, June, 1924, p. 892.
Spain. July 5, 1924. *Ga. de Madrid*, Aug. 7, 1924, p. 747.

GREEK REPARATIONS. Lausanne, July 24, 1923.

Promulgation:

Italy. Jan. 31, 1924. *G. U.*, May 28, 1924, p. 2044.

Signatures: Greece, France, Great Britain, Italy. *G. U.*, May 28, 1924, p. 2044.

LEAGUE OF NATIONS. Covenant. Protocol of Amendments. Geneva, Oct. 3–5, 1921.

Ratification deposited:

Great Britain (including Canada, Australia, Union of South Africa, New Zealand and India) (Art. 6) Aug. 12, 1924. *G. B. Treaty series*, no. 32 (1924) *Cmd.* 2241.

Italy (Art. 6) June 13, 1924. *Monit.*, Aug. 8, 1924, p. 4011.

Liberia (Art. 4 and 6) May 1, 1924. *Monit.*, June 4, 1924, p. 2888. *L. N. O. J.*, June, 1924, p. 827.

Spain (Art. 6) Jan. 31, 1924. *Ga. de Madrid*, June 5, 1924, p. 1182.

LETTERS, ETC., OF DECLARED VALUE. Madrid, Nov. 30, 1920.

Ratification:

Serbia. June 28, 1924. *Ga. de Madrid*, July 3, 1924, p. 110.

MEDICAL EXAMINATION OF YOUNG PERSONS EMPLOYED AT SEA. Geneva, Nov. 10, 1921.

Ratification:

Japan. April 23, 1924.

Poland. June 11, 1924.

Spain. June 7, 1924. *I. L. O. B.*, July 15, 1924.

MERCHANDISE CLASSIFICATION. Santiago, May 3, 1923.

Ratification:

Costa Rica. June 25, 1924.

Paraguay. June 5, 1924. *Commerce Reports*, Aug. 18, 1924, p. 447.

MONEY ORDERS. Madrid, Nov. 30, 1920.

Ratification:

Serbia. June 28, 1924. *Ga. de Madrid*, July 3, 1924, p. 110.

MOTOR VEHICLES, International Circulation of. Paris, Oct. 11, 1909.

Notification that convention is binding:

Irish Free State. *Monit.*, Aug. 3, 1924, p. 3965. *E. G.*, Aug. 6, 1924.

NAVIGABLE WATERWAYS CONVENTION AND PROTOCOL. Barcelona, April 20, 1921.

Ratification:

Rumania. May 9, 1924. *L. N. O. J.*, June, 1924, p. 827.

NIGHT WORK OF WOMEN. Washington, Nov. 28, 1919.

Ratification:

Austria. June 6, 1924. *I. L. O. B.*, July 15, 1924.

Belgium. April 11, 1924. *Monit.*, Sept. 3, 1924, p. 4437.

NIGHT WORK OF YOUNG PERSONS. Washington, Nov. 28, 1919.

Ratification:

Belgium. April 11, 1924. *Monit.*, Sept. 3, 1924, p. 4437.

Austria. June 6, 1924.

Poland. June 23, 1924. *I. L. O. B.*, July 15, 1924.

OBSCENE PUBLICATIONS. Paris, May 4, 1910.
Adhesion:
Esthonia. *E. G.*, Aug. 27, 1924, p. 390. *Ga. de Madrid*, Aug. 22, 1924, p. 965.
Ratification:
Bulgaria. July 6, 1924.
Italy. July 8, 1924. *L. N. O. J.*, Aug. 1924, p. 1034.
Ratification deposited:
Brazil. June 3, 1924. *Monit.*, Aug. 24, 1924, p. 4270. *E. G.*, Aug. 27, 1924, p. 389.

OBSCENE PUBLICATIONS. Geneva, Sept. 12, 1923.
Signatures:
Danzig. Mar. 31, 1924.
Finland. Mar. 14, 1924.
Germany. Mar. 26, 1924.
Irish Free State. Mar. 31, 1924.
Japan. Mar. 31, 1924.
Monaco. Mar. 29, 1924.
South Africa. Mar. 15, 1924.
Turkey. Mar. 31, 1924. *L. N. O. J.*, May, 1924, p. 750.

OPIUM CONVENTION, 2D. The Hague, Jan. 23, 1912.
Ratification:
Switzerland. June 5, 1924. *For. Pol. Assoc. News bulletin*, July 18, 1924.

PARCEL POST CONVENTION. Madrid, Nov. 30, 1920.
Ratification:
Serbia. June 28, 1924. *Ga. de Madrid*, July 3, 1924, p. 110.

POLISH TREATY. Versailles, June 28, 1919.
Ratification deposited:
Poland. Aug. 22, 1924. *J. O.*, Aug. 31, 1924, p. 8034.

POSTAL CONVENTION. Buenos Aires, Sept. 15, 1921.
Adhesion:
Spain. Aug. 5, 1924. *Ga. de Madrid*, Aug. 13, 1924, p. 855.

POSTAL CONVENTION. Madrid, Nov. 13, 1920.
Promulgation:
Brazil. Feb. 20, 1924. *P. A. U.*, July, 1924, p. 732.

POSTAL SUBSCRIPTIONS TO NEWSPAPERS. Madrid, Nov. 30, 1920.
Ratification:
Serbia. June 28, 1924. *Ga. de Madrid*, July 3, 1924, p. 110.

POSTAL TRANSFERS. Madrid, Nov. 30, 1920.
Ratification:
Serbia. June 28, 1924. *Ga. de Madrid*, July 3, 1924, p. 110.

PROTECTION OF INDUSTRIAL PROPERTY. Paris, March 20, 1883. Revision. Brussels, Dec. 14, 1900; Washington, June 2, 1911.
Adhesion:
Syria.
Lebanon. *E. G.*, Aug. 27, 1924, p. 388.

RADIOTELEGRAPH CONVENTION. London, July 5, 1912.
Adhesion:
Irish Free State. April 22, 1924.
Tanganyika Territory. March 5, 1924. *E. G.*, May 28, 1924, p. 274. *Monit.*, June 4, 1924, p. 2888.

RAILWAYS REGIME. Convention and statute. Geneva, Dec. 9, 1923.
Signature:
Czechoslovakia. June 3, 1924. *L. N. O. J.*, Aug. 1924, p. 1033.

REFRIGERATION, INTERNATIONAL INSTITUTE OF. Paris, June 21, 1920.
Ratification deposited:
Japan. March 4, 1924. *Monit.*, May 23, 1924, p. 2691.

RIGHT TO A FLAG OF STATES HAVING NO SEACOAST. Barcelona, April 20, 1921.
Ratification:
Austria. July 10, 1924. *L. N. O. J.*, Aug. 1924, p. 1033.
Japan. Feb. 20, 1924. *L. N. O. J.*, May, 1924, p. 749.

SANITARY CONVENTION. Paris, Jan. 17, 1912.
Ratification deposited:
Hungary. Aug. 1, 1924. *J. O.*, Aug. 20, 1924, p. 7754.

SERVICE DES RECOUVREMENTS. Madrid, Nov. 30, 1920.
Ratification:
Serbia. June 28, 1924. *Ga. de Madrid*, July 3, 1924, p. 110.

SPITZBERGEN. Paris, Feb. 9, 1920.
Ratification:
Italy. July 19, 1924. *G. U.*, Aug. 19, 1924, p. 2879.

TANGIER CONVENTION. Paris, Dec. 18, 1923.
Ratifications deposited:
Great Britain, France, Spain. May 14, 1924. *G. B. Treaty series*, no. 23 (1924) *Cmd.* 2203.

TRADE-MARKS REGISTRATION. Madrid, April 14, 1891. Revision. Brussels, Dec. 14, 1900; Washington, June 2, 1911.
Adhesion:
Luxemburg. *E. G.*, Aug. 27, 1924, p. 389.

UNEMPLOYMENT CONVENTION. Washington, Nov. 28, 1919.
Ratification:
Austria. June 6, 1924.
Poland. June 11, 1924. *I. L. O. B.*, July 15, 1924.

UNEMPLOYMENT INDEMNITY IN CASE OF LOSS OF SHIP. Geneva, July 9, 1920.
Ratification:
Poland and Spain. *I. L. O. B.*, July 15, 1924.
UNIVERSAL POSTAL UNION. Revision. Madrid, Nov. 30, 1920.
Adhesion:
Soviet Union. June 24, 1924. *E. G.*, July 2, 1924.
Ratification:
Serbia. June 28, 1924. *Ga. de Madrid*, July 3, 1924, p. 110. *E. G.*, Aug. 27, 1924, p. 383.
WEEKLY REST IN INDUSTRY. Geneva, Nov. 17, 1921.
Ratification:
Poland and Spain. *I. L. O. B.*, July 15, 1924.
WEIGHTS AND MEASURES BUREAU. Paris, May 20, 1875. Revision. Oct. 6, 1921.
Ratification deposited:
Italy. Aug. 6, 1924. *J. O.*, Aug. 21, 1924, p. 7802.
WHITE LEAD IN PAINT. Geneva, Nov. 19, 1921.
Ratification:
Austria. June 6, 1924.
Poland. June 23, 1924.
Spain. June 7, 1924. *I. L. O. B.*, July 15, 1924.
WHITE SLAVE TRADE. Paris, May 4, 1910.
Adhesion:
Gold Coast. June 21, 1924. *Monit.*, Aug. 22, 1924, p. 4246.
Falkland Islands. *Monit.*, July 31, 1924, p. 3884.
Leeward Islands and Mauritius. *Monit.*, June 4, 1924, p. 2888.
Ratifications deposited:
Brazil. June 3, 1924. *Monit.*, Aug. 27, 1924, p. 4314.
Italy. May 28, 1924. *Monit.*, July 31, 1924, p. 3884.
WHITE SLAVE TRADE. Geneva, Sept. 30, 1921.
Adhesion:
Falkland Islands. May 8, 1924. *L. N. O. J.*, June, 1924, p. 827. *Monit.*, June 7, 1924, p. 2034.
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Germany. July 8, 1924. *L. N. O. J.*, Aug., 1924, p. 1033.
Italy. June 30, 1924. *Monit.*, July 31, 1924, p. 3885.
WORKMEN'S COMPENSATION IN AGRICULTURE. Geneva, Nov. 12, 1921.
Ratification:
Poland and Irish Free State. *I. L. O. B.*, July 15, 1924.

M. ALICE MATTHEWS

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

AMERICAN AND BRITISH CLAIMS ARBITRATION TRIBUNAL[1]

FIJI LAND CLAIMS

American traders acquired certain lands in the Fiji Islands by purchase from native chiefs years before the cession of the islands to Great Britain in 1874. After the cession, Great Britain established a board of land commissioners to pass upon the validity of titles to land in the islands, and by 1882 more than 1,300 claims were passed upon.

The titles of these American claimants were denied by the land commissioners, and Great Britain contended that the chiefs who sold the lands could not acting alone convey the equivalent of a fee simple title; that under native custom certain occupiers of the soil had specific rights which could not be alienated without their express consent, and that as the latter were not parties to the deeds, no valid titles had been conveyed.

The Tribunal held that the chiefs had the power to convey, and drew a distinction between the want of power and the possible abuse of the power. Each case was thereupon considered upon its merits and awards rendered accordingly.

CASE OF GEORGE RODNEY BURT (CLAIM NO. 44)

Award rendered at London, October 26, 1923

Held, that the claimant had valid conveyances from the chiefs, and that the British authorities, by refusing to recognize his title, failed to carry out the obligation which Great Britain, as the succeeding power in the islands, must be held to have assumed from the point of view of international law.

Speculative valuation and prospective profits not included in the award.

On the tenth day of October, 1874, Great Britain acquired by peaceful cession "the possession of and full sovereignty and dominion over" the Fiji Islands. The deed of cession executed by Thakombau (or Cakobau), the then reputed overlord chief or King in Fiji, and by twelve other natives styled the "high chiefs" of the islands, reads as follows:

WHEREAS, divers subjects of Her Majesty the Queen of Great Britain and Ireland have from time to time settled in the Fijian group of Islands, and have acquired property or certain pecuniary interests therein; And whereas the Fijian Chief Thakombau, styled Tui Viti and Vunivalu, and other high Chiefs of the said Islands, are desirous of securing the promotion of civilisation and Christianity, and of increasing trade and industry within the said Islands; And whereas it is obviously desirable in the interests as well of the natives as of the white population that order and good government should be established therein; And whereas the said Tui Viti and other high Chiefs have conjointly and severally requested Her Majesty

[1] Established in pursuance of the special agreement between Great Britain and the United States, signed at Washington, Aug. 18, 1910. (Supplement to this JOURNAL, Vol. 5, pp. 257–267.)

Arbitrators: Henri Fromageot, Edward A. Mitchell Innes, Robert E. Olds.

Agents and Senior Counsel: United States—Mr. Fred K. Nielsen; Great Britain—Sir Cecil J. B. Hurst.

Previous decisions of the tribunal will be found printed in this JOURNAL, Vol. 7, pp. 875–890; Vol. 8, pp. 650–665; Vol. 15, pp. 292–304; Vol. 16, pp. 106–116, 301–333.

Headnotes supplied by the Managing Editor.

the Queen of Great Britain and Ireland aforesaid to undertake the government of the said Islands henceforth; And whereas, in order to the establishment of British government within the said Islands, the said Tui Viti and other the several high Chiefs thereof, for themselves and their respective tribes, have agreed to cede the possession of and the dominion and sovereignty over the whole of the said Islands, and over the inhabitants thereof, and have requested Her said Majesty to accept such cession; which cession the said Tui Viti and other high Chiefs, relying upon the justice and generosity of Her said Majesty, have determined to tender unconditionally, and which cession, on the part of the said Tui Viti and other high Chiefs is witnessed by the execution of these presents, and by the formal surrender of the said territory to Her said Majesty; And whereas his Excellency Sir Hercules George Robert Robinson, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Governor, Commander-in-Chief, and Vice-Admiral of the British Colony of New South Wales and its Dependencies, and Governor of Norfolk Island, hath been authorized and deputed by Her said Majesty to accept on her behalf the said cession:

Now these presents witness,

1. That the possession of and full sovereignty and dominion over the whole of the group of Islands in the South Pacific Ocean known as the Fijis (and lying between the parallels of latitude of fifteen degrees south, and twenty-two degrees south of the Equator, and between the meridian of longitude of one hundred and seventy-seven degrees west, and one hundred and seventy-five degrees east of the meridian of Greenwich), and over the inhabitants thereof, and of and over all ports, harbours, havens, roadsteads, rivers, estuaries, and other waters, and all reefs and foreshores within or adjacent thereto, are hereby ceded to and accepted on behalf of Her said Majesty the Queen of Great Britain and Ireland, her heirs and successors, to the intent that from this time forth the said Islands, and the waters, reefs, and other places as aforesaid, lying within or adjacent thereto, may be annexed to and be a possession and dependency of the British Crown.

2. That the form or constitution of Government, the means of the maintenance thereof, and the laws and regulations to be administered within the said islands, shall be such as Her Majesty shall prescribe and determine.

3. That, pending the making by Her Majesty, as aforesaid, of some more permanent provision for the Government of the said islands, His Excellency Sir Hercules George Robert Robinson, in pursuance of the powers in him vested, and with the consent and at the request of the said Tui Viti and other high Chiefs, the ceding parties hereto, shall establish such temporary or provisional Government as to him shall seem meet.

4. That the absolute proprietorship of all lands, not shown to be now alienated, so as to have become *bona fide* the property of Europeans or other foreigners, or not now in the actual use or occupation of some Chief or tribe, or not actually required for the probable future support and maintenance of some Chief or tribe, shall be and is hereby declared to be vested in Her said Majesty, her heirs and successors.

5. That Her Majesty shall have power, whenever it shall be deemed necessary for public purposes, to take any lands upon payment to the proprietor of a reasonable sum by way of compensation for the deprivation thereof.

6. That all the existing public buildings, houses, and offices, all enclosures and other pieces or parcels of land now set apart or being used for public purposes, and all stores, fittings, and other articles now being used in connection with such purposes, are hereby assigned, transferred, and made over to Her said Majesty.

7. That, on behalf of Her Majesty, His Excellency Sir Hercules George Robert Robinson promises: (1) That the rights and interests of the said Tui Viti and other high Chiefs, the ceding parties hereto, shall be recognized, so far as is consistent with British sovereignty and colonial form of government. (2) That all questions of financial liabilities and engagements shall be scrutinised, and dealt with upon principles of justice and sound public policy. (3) That all claims to titles of land, by whomsoever preferred, and all claims to pensions or allowances, whether on the part of the said Tui Viti and other high Chiefs, or of persons now

holding office under them or any of them, shall in due course be fully investigated and equitably adjusted.

In witness whereof, the whole of the contents of this instrument of cession having been, previously to the execution of the same, interpreted and explained to the ceding parties hereto, by David Wilkinson, Esq., the interpreter nominated by the said Tui Viti and the other high Chiefs, and accepted as such interpreter by the said Sir Hercules George Robert Robinson, the respective parties hereto have hereunto set their hands and seals.

Done at Levuka, this 10th day of October, in the year of our Lord 1874.

(Signed) (L.S.) CAKOBAU, R.,
Tui Viti and Vunivalu.
(L.S.) MAAFU.
(L.S.) TUI CAKAU.
(L.S.) RATU EPELI.
(L.S.) VAKAWALETABUA, TUI BUA.
(L.S.) SAVENAKA.
(L.S.) ISIKELI.
(L.S.) ROKO TUI DREKETI.
(L.S.) NACAGILEVU.
(L.S.) RATU KINI.
(L.S.) RITOVA.
(L.S.) KATUNIVERE.
(L.S.) MATANITOBUA.
(Signed) (L.S.) HERCULES ROBINSON.

I hereby certify that, prior to the execution of the above instrument of cession, which execution I do hereby attest, I fully and faithfully interpreted and explained to the ceding parties hereto, the whole of the contents of the said document (the several interlineations on p. , line , and on p. , line of the manuscript having first been made), and that such contents were fully understood and assented to by the said ceding parties. Prior to the execution of the said instrument of cession, I wrote out an interpretation of the same in the Fijian language, which interpretation I read to the several Chiefs, who one and all approved thereof. A copy of such interpretation is hereto annexed marked (A).

Dated this 10th day of October, A.D. 1874.

(Signed) D. WILKINSON,
Chief Interpreter.

2. Immediately after the cession, Great Britain established the appropriate machinery to investigate and pass upon the validity of titles to land. This machinery consisted of a board of land commissioners whose findings and conclusions were subject to review by the Governor in Council. Somewhat later provision was made for rehearing on a proper petition before a final tribunal made up of the Governor and the members of his Council, with the Chief Justice of the Colony and the Native Commissioner sitting with them. It appears that between 1874 and 1882 more than 1,300 claims were thus considered and passed upon. Under the normal procedure where a claim was allowed a Crown grant covering the land involved was issued; where a claim was disallowed a Crown grant *ex gratia*, covering a portion of the land claimed, was sometimes made.

3. George Rodney Burt, a native citizen of the United States, came to the Fiji Islands in 1856, and, excepting the period from 1871 to 1874, hereinafter

more particularly referred to, resided in the islands continuously until 1894. He at first carried on a general trading business and later engaged in farming on a comparatively large scale for this region. In 1862 he took up land on the Upper Rewa River and is said there to have established the first real plantation in the islands. In 1866 he went to the Sigatoka River district and purchased a tract of land called Kavokai Nagasau, afterwards sold by him to a German subject who eventually obtained a Crown grant for it. In 1868 Burt purchased another tract known as Emuri and situated on the opposite side of the Sigatoka River from Kavokai Nagasau. It is the title to the Emuri tract, consisting of 3,750 acres, which is involved in this controversy.

4. The purchase of Emuri is evidenced by three deeds and a certificate, running to Burt and his partner Underwood who was subsequently bought out by Burt. These papers are set forth in the Appendix to the United States Memorial at pp. 187–195. The first deed was executed on February 27, 1868, for a consideration of $200 in merchandise. The description of boundaries being found unintelligible, a second deed, dated June 2, 1868, was executed, ostensibly to remedy this defect. The consideration in this latter instrument is given as $220 in trade, apparently including the $200 previously paid. Still later a third deed, dated October 28, 1868, was obtained by Burt in order to extend the boundaries of the tract. The consideration named in this final transfer is $320 which included the $220 already paid, and $100 in gold paid down on the execution of the deed. The certificate referred to deals with a complication arising from a conveyance by other parties to some part of the land in question, and is a declaration by the principal chief signing the deeds to the effect that such conveyance was null and void.

The grantors in these deeds were Ratu Kini, who seems to have been at the time the undisputed paramount and ruling chief of the territory in which Emuri lies, and certain other subordinate chiefs or heads of tribes supposed to have an interest in the land. While the evidence is to some extent conflicting on the question of the voluntary execution of the deeds by some of the grantors other than Ratu Kini, and as to the receipt of any part of the consideration by such other grantors, we are satisfied that Burt and Underwood secured from the ruling chiefs such title to Emuri as they had power and right to give.

5. Burt and his partner entered into possession of the land in February, 1868, and proceeded to make substantial improvements. Buildings were erected, planting was done, and about 200 head of livestock were put on the property, approximately 500 acres being thus actually occupied during 1868. (Memorial, p. 201.) This occupation which the Land Commissioners specifically found to be "substantial" (Memorial, p. 201), subsisted for some ten months when it was interrupted in January, 1869, by an incursion by a savage mountain tribe, described as the most unruly element in the

islands. The buildings were burned, the land was devastated, and Burt barely escaped with his life. He went back six months later, but was not permitted by the members of this mountaineer tribe to resume operations or gather his crop of cotton; and he was, therefore, obliged to go away from the plantation and seek other remedies. Evidence produced at the hearing shows that early in 1869 Burt appealed to the United States authorities and presented a bill for damages in the sum of $69,000 for raids and depredations of the natives, and that an investigation of the matter was conducted by Commander Truxton of the U. S. Warship *Jamestown*. Commander Truxton found that Burt had been damaged to the extent of $50,000, and referred the claim to Washington for such action as the United States Government might see fit to take. It also appears from the same evidence that at the beginning of April, 1869, Burt was in Sydney, New South Wales, attempting to raise money to resume operations in Fiji. He then went to the United States and during 1871 pressed his claim before the State Department in Washington. The proceedings before the Department were evidently protracted and it was not until June 1873 that the final answer of the State Department was given. In substance the United States Government declined to incur the expense or risk of collecting Burt's claim but it acceded to his request that the American consular agent in Fiji be directed to place no obstacle in his way.

In 1874 Burt is found back in Fiji. Conditions meanwhile in the islands had manifestly remained more or less chaotic. An attempt had been made to set up an effective government through the creation of a native confederacy, but it can hardly be said that public order and a settled government, satisfactory either to the natives or to the white population, had been established. Perhaps the best evidence of this is to be found in the Deed of Cession of October 10, 1874, which recites the obvious desirability "in the interests as well of the native as of the white population that order and good Government should be established."

The record contains a deed dated in July, 1874, from Burt to one Ives of Coldwater, Michigan, purporting to sell Emuri for a consideration of $10,200. It seems to be a reasonable inference that this transaction was in effect a transfer of the property as security for a loan. Evidently Ives was a personal friend; Burt left him a small sum of money in his will. Ives is not shown ever to have been in Fiji or to have had any other interest in the islands; and in 1879 he executed a deed, releasing the property to Burt for the same consideration, to wit: $10,200. Whether this is the proper construction of the transaction or not, we are of the opinion that for the purposes of this case the situation was not essentially affected by it.

In 1875, when the title stood in Ives, Burt filed with the Board of Land Commissioners a claim for a Crown grant in Ives' name but over Burt's own signature. This claim was not pressed and was never brought on for hearing. From 1875 on for a number of years the whole subject of land titles

was in the hands of the local British authorities, and claims were being considered in the order in which they were filed. The process was clearly a lengthy and somewhat complicated one. In 1879 a time limit was fixed for the filing of claims, and Burt in that year, and after the release to him from Ives, filed his claim to Emuri in his own right. In May, 1880 the Board of Land Commissioners disallowed the Burt claim but recommended that he be given an *ex gratia* grant for 160 acres. In July of that year the Governor in Council, in a decision which was not published at the time, approved the finding of the Land Commissioners but cut the *ex gratia* grant down to 100 acres, whereupon Burt went into possession of the 100 acres and made substantial improvements. In November, 1882, a petition for a rehearing was presented by the Native Commissioner on behalf of two natives claiming an interest in the land. This rehearing was not gazetted until March, 1883, and a decision was not given until April, 1884, when the claim was disallowed in its entirety, and Burt was excluded from the 100 acres which he had occupied a year and a half earlier.

6. On these facts the precise question before this Tribunal is whether Great Britain, as the succeeding Power in the islands under the Deed of Cession of 1874, failed in any respect to observe and carry out any obligation toward Burt which it may be properly said, from the point of view of international law, to have assumed. If Burt had at the time a valid title to the lands, it is plain that under all the circumstances the government was bound to recognize and respect it. In this connection we do not concern ourselves with the methods and the procedure adopted and employed in dealing with land titles. We have no criticism to make in this regard; on the contrary we feel that good faith is rightly attributable to the authorities at every stage and that the procedure was the customary and appropriate one for handling a situation of this nature. We look only to the general result which was reached and note that this result was the ultimate denial of Burt's right.

7. We therefore come to the particular question involved: whether Burt had at the time of the cession such an interest as to entitle him to invoke the obligation of the succeeding Power? His title to Emuri, resting as it did upon a conveyance from the ruling chiefs of the territory in which the land was situated, naturally depended upon the power of such chiefs to convey. It has been strenuously contended by counsel for Great Britain that in the then existing state of land tenures in Fiji, the chiefs acting alone could not convey the equivalent of a fee simple title to land. It is asserted that under the native custom a certain class, known as "taukeis" and defined as occupiers of the soil, had specific rights which could not be alienated without their express consent. It was, therefore, urged that inasmuch as the taukeis were not parties to the deeds, no valid title could have been conveyed. The record contains much in the way of opinion and argument upon this question. Various theories were advanced both at the time of the cession to Great Britain and afterwards. As time passed, the taukei view

commanded more and more attention, and some years after the cession seems to have been rather definitely taken by the local authorities. We think it must be recognized that in this period of transition from primitive native custom to the white man's law, it would be difficult, if not quite impossible, to lay down at any particular moment of time an exact definition of land polity in the Fiji Islands. We entertain grave doubts about the existence at any time of an intelligible system of feudal tenures or a consistent law of real property as we understand it among the natives. If there is any one fact which stands out with striking prominence during the entire period anterior to the cession it is that the law of the club pretty effectually dominated the situation. On the other hand there are well authenticated instances in which the chiefs themselves took fairly high ground in this matter and regarded themselves virtually as trustees for their people. They certainly assumed to dispose of land as they chose, but sometimes they did so with a commendable caution and in a spirit of great fairness to their subjects. We find Thakombau stating frankly that all that was needed in such a case was his own word and that whether he ought to give his word and would do so was the real question. In discussing the question of the cession to Great Britain with his own chiefs, he declared that they must consider it with the utmost care because as he said "what we do to-day cannot be undone to-morrow." It stands without dispute that the most solemn and consequential act affecting land and sovereignty in the islands was performed on the theory that the chiefs had the power to act. The British authorities of the day did not proceed hastily in this momentous transaction; they took advice on the point. They had before them the conflicting theories and deliberately adopted the view that the chiefs were competent to convey. Sir Hercules Robinson, Sir John Thurston and Sir Arthur Gordon may be considered on this record to have committed themselves clearly in this respect at the critical moment of the cession. We cannot help feeling that, on the whole case, the chiefs had the power, and that the distinction between want of power and possible abuse of power goes far towards reconciling the conflicting views. One hesitates to believe that the people on the ground, either whites or natives, in their practical dealings were or could under the circumstances be profoundly influenced by ideal considerations on the subject of land tenures. They were confronted not by a theory, but by an actual condition, and we do not feel called upon at this distance of time to take up the academic task of laying down and applying principles which would evidently run so decidedly against the current of actual dealings on the spot.

At this point it is proper to note that the Land Commissioners in 1880 solemnly held that if the signatures of the three chiefs attached to the deed of June 2, 1868, were "genuine and were obtained *bona fide*, they were undoubtedly the proper persons to have executed the grant."

8. Passing now to the question of the subsistence of Burt's right up to

the date of the cession to Great Britain, we have only to enquire whether a reasonable construction of the evidence shows any abandonment by him of his claim. The inference to our minds is irresistible that if he had not been dispossessed of Emuri by the wrongful, violent act of an uncontrolled and uncontrollable mountain tribe—an event which the Land Commissioners found to have no bearing upon his title—he would have continued in occupation, and it is not an unwarranted assumption to say that if the cession to Great Britain had taken place in 1869, Burt would have almost automatically received a Crown grant. We fail to find anything in the subsequent events which indicates any intention on his part to abandon; on the contrary he diligently prosecuted his claim so far as the circumstances and his limited resources permitted, and was at no stage of the proceedings in default. He stood upon his rights under the conveyances from the chiefs, and, on the view which we take, the Crown authorities, by refusing to recognize his title, failed to carry out the obligation which Great Britain, as the succeeding Power in the islands, must be held to have assumed.

9. The damages are necessarily unsusceptible of accurate determination. The Memorial of the United States presents the maximum possible claim. The demand is for $232,929.50 with interest from April 25, 1884. We cannot avoid the impression that the bill as presented comprises a large element of speculative valuation and prospective profits, and we have reached the conclusion that upon the whole case full justice would be done by a lump award of £10,000 or its equivalent in dollars as of the date of the award.

NOW THEREFORE:

The Tribunal decides that the British Government shall pay to the United States the sum of £10,000.

The President of the Tribunal,
HENRI FROMAGEOT.

London, October 26, 1923.

CASE OF BENSON ROBERT HENRY (CLAIMS NO. 44 *ter.*)

Award rendered at London, November 2, 1923

The only question involved in this case was whether on the date of the cession of Fiji to Great Britain the claimant was the proprietor of the lands in question. *Held* that the evidence failed to discharge the onus of proof imposed upon the claimant, that it was reasonable to infer that the claimant was acting, not on his own behalf, but as a trustee or agent, and that there was no warrant for making an award in his favor.

This is a claim for compensation, preferred by the Government of the United States of America on behalf of one, Benson Robert Henry, an American citizen, arising out of the disallowance of his title to 480 acres of land in the Island of Fiji. We propose to state the facts of this case only in detail sufficient to explain the character of the claim and to elucidate our

decision which turns, as will presently appear, on one single question, namely, whether on October 10, 1874, the date of the cession of Fiji to Great Britain, the claimant was, in his own right, proprietor of the lands in question or any part of them.

In September, 1855, Commander Boutwell, of the United States Navy, whose ship was then visiting Levuka, imposed upon the Chief Cakobau the payment of about nine thousand pounds sterling as compensation for destruction and theft by Fijian natives of property belonging to American citizens. This sum was to be paid in twelve months. In 1867 only a small portion of it had been paid; and on July 12 of that year Cakobau signed a document hypothecating certain lands as security for payment of the balance.

In 1868 two gentlemen, by name Brewer and Evans, arrived in Fiji from Melbourne as agents for the Polynesia Company Limited of Melbourne, then about to be formed; and on July 23, 1868, a charter was granted them, as such agents, by Cakobau, who is chief signatory, with the ratification and confirmation of six principal chiefs under Cakobau.

By the material portion of that charter Brewer and Evans undertook on behalf of the said company to provide for the payment of the compensation, already referred to, to the United States of America; and, in consideration thereof, Cakobau ceded, granted and transferred to Brewer and Evans as trustees for the said proposed company about two hundred thousand acres of land as specified in the schedule. Paragraph 4 of the schedule is as follows:

> 4. Also Suva, its harbour, territories, and district, commencing from Lami, running along the cost towards Rewa, to the township of Kalabo, and running inland to the Waimanu. (Memorial, p. 259.)

The lands so described include those in respect of which Henry's claim arises.

This charter was accompanied by the following agreement:

> The Company agree not to alienate any of the land until the whole of the American debt be paid. Should the amount not be paid within the time specified in the agreement of the Company with Dr. Brewer, the land reverts to King Thakombau. (Memorial, p. 259.)

On the following day, July 24, Evans and Brewer executed an agreement under seal, by which they undertook to pay the balance of the compensation due from Cakobau to the United States of America, the first instalment on their return to Melbourne, the second and final instalment on or before July 24, 1869. These instalments were in fact paid by the Polynesia Company Limited on July 13, 1869, and on November 19, 1870, respectively.

By a deed dated July 13, 1869, Cakobau and one Natika, with the ratification and confirmation of nine other chiefs and landowners, who also signed, conveyed to the Polynesia Company Limited certain lands at Suva to the

extent of about 27,000 acres, wherein were included the 480 acres in respect of which this claim for compensation is made.

The Polynesia Company Limited, having been formed, issued its regulations in November, 1869, under which land-warrants were to be issued to shareholders entitling them to "select" lands in districts declared by the company "open for settlement." The Suva lands were declared open for settlement. No shareholder might make more than one frontage selection in the Suva district; and any selection with a sea frontage was limited to 160 acres.

On August 12, 1870, Jacob Brache, a director of the Polynesia Company Limited, T. Copeland and the claimant Henry entered into the following agreement at Melbourne:

Articles of Agreement

Melbourne, Australia,
August 12, 1870.

We, the undersigned Jac. Brache and T. Copeland and B. R. Henry, do agree to associate ourselves together for the purpose of selecting land in Fiji from Shares and Land Warrants of the Polynesian Company Limited now held by the said Jac. Brache and for said purposes do hereby agree to send B. R. Henry to Fiji to select and Locate upon such Lands as he may deem best for agricultural purposes AND we further agree to give to B. R. Henry in consideration of his services when the association is entered in and agreed to, one third of one hundred and sixty of the above-named Shares, and Thos. Copeland agrees to pay J. Brache one hundred and forty pounds sterling for Eighty of the above shares if the said B. R. Henry reports that land can be cultivated in Fiji profitably and to the mutual advantage of each of the undersigned.

J. BRACHE
(in Trust.)
T. COPELAND
B. R. HENRY
(Memorial, p. 264.)

On the same day, in pursuance of this agreement, Henry signed a receipt in these terms:

Melbourne, August 12, 1870.

Received from Mr. Jacob Brache One hundred and Sixty shares in Polynesia Company Limited with Land Warrants for Six hundred and forty acres and also, Warrants for six Town lots such shares and Warrants to be held in trust by the Undersigned in accordance with the Articles of Agreement between Jacob Brache, Thomas Copeland and Benson Robert Henry dated August 12 1870 also another Warrant for six town lots by the Polynesia Company Limited in the name of Franz Bleaker and are in the name of Charles Brache all the above mentioned shares and Land Warrants to be held in trust by the Undersigned.

B. R. HENRY.

Numbers of issue of shares viz.: 504, 505, 507, 508, 509, 510, 511; 17 Land Warrants viz.: 382, 129A, 190A, 466, 468, 469, 470, 471, 472, 473, 214A, 189A. (Memorial, p. 268.)

This document is ungrammatical and confused; and the number of warrants specified in the foot-note is irreconcilable with the receipt itself. In our opinion, the first sentence of the receipt refers to the four land warrants Nos. 586, 587, 588 and 589 hereinafter mentioned.

In December, 1870, the claimant Henry and Copeland arrived in Suva, and selected four lots of 160 acres each, represented by warrants numbered 586 to 589 inclusive. Two contiguous lots, the warrants for which were numbered 586 and 588 fronted on the Tamavua River, and are hereinafter referred to as the Tamavua Block; two other contiguous lots, further South, fronting on Suva Harbor, are hereinafter referred to as the Harbor Block, and were covered by warrants 587 and 589.

Warrant No. 586 passed into the possession of Jacob Brache and was lost. The land held thereunder formed the subject matter of a conveyance from the Polynesia Company Limited to the claimant Henry dated April 12, 1875. Warrant No. 588 is made out to Charles Brache and his assigns, and is indorsed under date of December 23, 1870, by Henry, as attorney for Charles Brache, to Copeland. Warrant No. 587 is made out to Henry and his assigns and is indorsed with an assignment in blank by Henry, also under date of December 23, 1870, thus becoming negotiable. Warrant No. 589 is made out to T. Copeland and his assigns and is not endorsed. It is with the 480 acres under warrants 586, 587 and 588 that this claim is concerned.

On July 29, 1873, Henry and Copeland executed a power of attorney to Jacob Brache, authorizing him *inter alia*

> . . . for us and in our names and as our names and as our acts and deeds to sign seal and deliver all deeds and documents receipts &c. and receive all moneys lands warrants and conveyances of land to which we may become entitled in virtue of our shares in the Polynesia Company Limited and Selections made by us in Suva, Fiji, under the regulations of the aforesaid Company, also to vote and act for us at all the meetings of the Polynesia Company Limited and to sue and be sued in our behalf (in all matters relative to the aforesaid company) . . . (Memorial, p. 279.)

On August 12, 1873, Jacob Brache, acting under this power, assigned all right title and interest of Copeland and Henry in both the Harbor and Tamavua Blocks to Charles Brache, to be held in trust for a certain proposed company until certain payments were made to Jacob Brache by Henry and Copeland. There is no evidence that these payments were ever made.

In April, 1874, Henry pledged the Harbor Block warrants, Nos. 587 and 589, to one Simmonds for forty-five pounds, and shortly afterwards in that year left Fiji; nor, except that he is alleged to have been subsequently in communication with his attorney in Fiji, Mr. Scott, is he heard of again till 1898, when, in connection with proposed action by the United States State Department on his behalf in the matter of his Fiji land claims, he swears in Oregon an affidavit containing statements of doubtful accuracy.

In October, 1874, Fiji was ceded to Great Britain and the Lands Com-

mission was instituted by Great Britain to inquire into existing land titles in Fiji in accordance with the undertaking contained in the deed of cession.

In December, 1874, Jacob Brache redeemed the pledged Harbor land-warrants from Simmonds, who inclosed a receipt to Brache in the following letter:

Receipt for £43 17s. 5d.

Mr. Jacob Brache.
Dear Sir, December 7, 1874.

I hereby acknowledge to have received from you (and for which you have a separate receipt) the sum of £43 17s. 5d. for money advanced by Mr. W. Simmonds, of Suva, to Mr. B. R. Henry, of Suva, on certain warrants of land selected by him for you, and which said warrants I have handed to you.

Yours truly,
C. SIMMONDS.
(British Answer p. 9.)

The suggestion underlying this letter, that the original selection of Suva lands by Copeland and Henry was made on behalf of Jacob Brache, is repeated in another letter written to Jacob Brache by Copeland, which is in these terms:

My dear Mr. Brache, Levuka, June 21, 1875.

Yours of the 31st ultimo to hand. I enclose you the power of attorney, signed as requested, and sincerely trust you will come out of the Polynesia "spec" all right.

T. A. COPELAND.

P.S.—The Governor and Land Commissioner have arrived. I shall put in my application for the Suva Block, and send you full power of attorney. It is the only way left to secure you the block. (Answer, p. 10.)

And again, in a letter to the Commissioner of Lands, Fiji, dated Melbourne, September 28, 1875, Jacob Brache, referring to Copeland's 160 acres of the Harbor Block, writes: ". . . As I am the holder of the said warrant under assignment, the title for such land must naturally pass in my hands." (Answer, p. 12.)

Some correspondence between Jacob Brache and the Lands Commission ensued; and on January 13, 1876, Jacob Brache, as attorney for one Alfred Asbeck, presented a petition for a Crown grant in respect of the Harbor Block alleging therein that Asbeck on September 1, 1873, had purchased these lands from Copeland and Henry and had paid 160 pounds sterling for them. This petition was heard in March, 1878, and, no evidence being offered, was disallowed.

On January 28, 1880, Jacob Brache preferred two more petitions to the Lands Commission, one, as attorney on behalf of Henry and Copeland, in respect of the Harbor Block of 320 acres; another, on behalf of Henry, in respect of the Tamavua Block of 320 acres. The two petitions were heard and were disallowed by the Governor-in-Council on January 31, 1882. The

Tamavua Block petition was reheard and dismissed on August 21, 1883. In connection with the rehearing of the Harbor Block petition, a question was raised as to the authority of Mr. Jacob Brache to represent Henry and Copeland. The point was argued before the Council on November 23, 1886, when Mr. Scott, as counsel for the petitioners, states that he appeared in a twofold position, representing Brache (1) as attorney for Henry and Copeland; (2) as being pecuniarily interested in the claim. (Answer, pp. 194, 195.) This petition, as being one in which the Crown had an interest, was referred, under ordinance XXV, of 1879, to the Acting Chief-Justice, who delivered an opinion to the effect that the claim be disallowed. This opinion was confirmed and the petition disallowed by the Governor-in-Council on September 12, 1887. These appear to us to be all the facts necessary for the decision of this claim.

For the purpose of our decision we make the following assumptions:

1. That Cakobau and his co-signatories gave a valid title in the Suva lands to the Polynesia Land Company Limited.
2. That the Polynesia Land Company Limited gave to their transferees valid titles in the Suva lands.
3. That a land warrant was a good muniment of title, whether perfected by a conveyance or not.
4. That no breach of the regulations of the Polynesia Land Company Limited had been committed.
5. That the title of the transferees of the Polynesia Land Company Limited was not affected by the fact that the payment of the second instalment of the indemnity by the Polynesia Land Company to the United States of America was made sixteen months after the appointed date.

We now address ourselves to the decisive question:

Was the claimant Henry on October 10, 1874, the date of the cession of Fiji to Great Britain, proprietor, in his own right, of the 480 acres of land in question or of any part of them?

The onus of satisfying the Tribunal on this point lies on the claimant.

Our answer to that question is in the negative.

The reasonable inference in our opinion to be drawn from Henry's operations and conduct, viewed in the light of the documents, and, in particular, of—

(1) the land warrants themselves;
(2) the agreement between Jacob Brache, Copeland and Henry dated August 12, 1870 (Memorial, p. 264);
(3) the receipt signed by Henry dated August 12, 1870;
(4) the assignment by Jacob Brache to Charles Brache dated August 12, 1873 (Memorial, p. 316);

is that Henry was acting from the beginning, whether he be correctly described as trustee or as agent, not on his own behalf. In any case, the

evidence falls far short of discharging the onus of proof which is imposed upon the claimant.

But, further, even if it be assumed that, in the first instance, Henry acquired these 480 acres of land for himself, having regard to the facts and documents already referred to and to the sale on September 1, 1873, for valuable consideration of Henry's 160 acres of the Harbor Block to Alfred Asbeck (Answer, p. 14), we cannot, in the absence of any explanation of these transactions by Jacob Brache, find ground to warrant us in making any award in favor of the claimant.

NOW THEREFORE:

The decision of the Tribunal in this case is that the claim of the Government of the United States of America be disallowed.

The President of the Tribunal,
HENRI FROMAGEOT.

London, November 2, 1923.

CASE OF THE HEIRS OF JOHN B. WILLIAMS (CLAIM NO. 44 *qr.*)

Award rendered at London, November 8, 1923

As regards two parcels of land involved in this claim, *held* that no title sufficient to justify an award could be found. As regards a third parcel, the title held to be good and claimant awarded damages for the refusal of British authorities to recognize it.

This claim is preferred by the Government of the United States of America on behalf of the heirs of J. B. Williams, asking for compensation arising out of the disallowance of that gentleman's title to certain lands in Fiji.

The lands in question are:

(1) 100 acres in the Island of Laucala;

(2) The Island of Nukulau, 20 acres;

(3) 1,000 acres at Nukubalavu in the Island of Viti Levu.

Mr. J. B. Williams appears to have gone to Fiji about the year 1840; he became United States Commercial Agent there, and died there in 1860.

1. As to the *Laucala* land, the claimants produce four documents as the foundation of Williams' title.

The first is a conveyance, dated June 1, 1846, from the Chief Cokana Uto or Phillips to Williams and Ichabod Handy, for a consideration of $50.20 in trade. (Memorial, p. 329.) This deed is endorsed by mark, by two natives, Koromoves and Korotabaleo, who as "landholders, acknowledged and consented to the sale." These two persons similarly endorsed the Nukulau conveyance, and are referred to by Mr. Carew, the Lands Commissioner, in his report on that petition, in the following terms:

> They appeared to have followed Cokanauto about for the purpose of confirming sales of land made by him whether his own property or that of others and it appears from evidence in other claims to have been a matter of indifference to them. (Memorial, p. 393.)

The second Laucala deed is a conveyance, in consideration of some articles in trade, from Koquaraniqio to Williams and Handy, dated September 25, 1846.

Both Cokana Uto and Koquaraniqio at the respective dates of their conveyances were rebels against and fugitives from the paramount chief of Rewa.

There is no evidence of occupation of Laucala by Williams or anyone else in right of Williams till in the year 1855 or 1856. That occupation took place under the following circumstances.

In September, 1855, the United States ship *John Adams*—Commander Boutwell—visited Fiji, in order to take punitive measures against the natives for the destruction and theft of American citizens' property, amongst such property being Mr. Williams' house on Nukulau. Commander Boutwell seized the occasion to investigate Williams' title to Laucala which was in dispute; and in his report to the Secretary of the Navy (Memorial, p. 362), after referring to the recent disturbances, he says:

> On learning these facts I determined to make the natives build our consul another house; pay the value of $1,200 in pigs, gum, and fish, for the loss of his property; and reinstate Mr. Williams in possession of his land, the two small islands of Nukulau and Lauthala, which he had purchased and had deeds for. I examined the interpreter who had made the purchase for the consul and his deeds, (and) decided that the land belonged to our consul, but was informed by Mr. Moore that the chiefs of Rewa and Vutia disputed the claim of Mr. Williams and Mr. Handy (an American) to this land. On September 18 I had an interview with the chiefs of Rewa on board, who acknowledged that the land had been sold to Mr. Williams, and on the 19th I had an interview with the chiefs of Vutia, who not only consented to Mr. Williams' claim, but countersigned the deeds.

These countersignatures, by mark, appear under an indorsement on the two deeds referred to testifying that: "This matter of the land has been settled to our satisfaction."

Commander Boutwell also indorsed and signed statements to the effect that the title of Williams and Handy was, in his opinion, good.

Without enquiring in detail into the actions of Commander Boutwell, and quite apart from native evidence, the circumstances in which these indorsements were made appear to us largely to rob them of value as evidence of free assent to the conveyances in question. Nor is Commander Boutwell's opinion of Williams' and Handy's title fortified by the fact that, according to his own report, he interviewed the chiefs after having determined to reinstate Mr. Williams in his disputed property.

But Williams was not yet satisfied as to his title; and two more documents were drawn up in identical terms and signed on the same day, the first by a Vutia chief, by name Ko Ra Daka Waqa, dated September 2, 1856, the other, by another Vutia chief, by name Tuni, dated October 2, 1856, and witnessed by one Charles Rounds. The following is the text of the earlier document:

Lauthala Rewa, September 2, 1856.

I, Ko Ra Daka Wanka, one of the Chiefs of Vutia do hereby acknowledge the purchase and payment by John B. Williams and Ichabod Handy of all that tract and parcel of land called Lauthala Point, or Island, all that part lying south of the creek called Vunia Vaudra which communicates with Rewa River and the Bay on the West side of Lauthala the said creek being navigable for boats at high water, and being the first approach from the anchorage in the roads; the receipt for the goods in payment whereof was previously acknowledged as per deed granted the first day of June and twenty fifth day of September in the year 1856. To have and to hold the above-released premises to the said John B. Williams and Ichabod Handy their heirs and assigns to them and their use and behoof for ever.

his
KO RA DAKA WAQA X
mark.

Witness to signature:
CHARLES ROUNDS.

There is no evidence of either of these documents having been explained to the signatory, or of any consideration having passed. But, apart from their value as evidence, it is somewhat difficult to appreciate their effect as muniments of title. They do not purport to be conveyances, or anything more than acknowledgments of the conveyances executed and the consideration paid in 1846. If the deeds of 1846 are valid and *bonâ fide* conveyances, these documents are superfluous; if the former are not valid and *bonâ fide* conveyances, the latter do not make them so.

Williams died on June 10, 1860, and Dr. Isaac Mills Brower took charge of his estate and granted leases of the Laucala lands, as Williams had done in some instances between 1856 and 1860.

After the cession of Fiji to Britain in 1874, the Lands Commission was instituted to investigate and report on the titles to land granted by natives to foreigners; and in 1875, the heirs of J. B. Williams presented a petition for a Crown grant of the Laucala lands in question. It was heard and disallowed in 1878. The petition was reheard in 1880 and the disallowance affirmed. (Answer, p. 100.)

We find that:

1. Neither of the two grantors under the deed of 1846 was, at the respective date of those deeds either *de facto* or *de jure*, in a position to give a good title to the Laucala land.
2. The indorsements on the two deeds of 1846 add nothing to their legal effect.
3. The title to these lands was in dispute in September, 1855.
4. There was no occupation of the Laucala land by Williams or on Williams' behalf till late in 1855 or in the year 1856.
5. The two deeds of 1856 do not affect Mr. Williams' title which stands or falls by the two conveyances of 1846.

It is pointed out in the Memorial (p. 58), that "four subclaims to land on

Laucala, obtained by purchase from Williams and presented by Messrs. Burt, Hennings, and Ryder, were allowed," the suggestion being that there is some inconsistency between disallowing the title of Williams and allowing titles of purchasers from him. There is no such inconsistency. These three purchasers proved substantial occupation and, thereupon, they were entitled under the principles followed in Fiji land cases, even in the absence of strict title, to a Crown grant *ex gratia*.

With regard to occupation of Laucala by Williams or in his right, no Crown grant *ex gratia* was made; and the refusal of such a grant is not a matter for the consideration of this Tribunal. It may be said that the fluctuating fortunes of native chiefs in civil war afford but slender foundation for any conclusion in one direction or the other as to their right to convey lands, but, apart from that feature of this claim, we think that no title is proved sufficient to justify an award in favor of the claimants. The claim in the Laucala case is, therefore, dismissed.

2. With regard to the *Nukulau* claim, it is to be noted that the Lands Commissioner reported favorably upon it, though it was disallowed by the Governor-in-Council both on the report and after rehearing. With this exception, the facts are substantially the same as in the Laucala claim.

The deed alleged to found Williams' title is a grant of the Island of Nukulau by Cokana Uto or Phillips to Williams and Andrew Breed and Samuel T. House, for a consideration of £30 in trade, and dated June 8, 1846. (Answer, p. 101.) Qaraniqio indorsed the deed on September 11, 1848:

> Nukulau, September 11, 1848.
>
> I acknowledge and consent to the sale of the within-named land, Nukulau, payment having been made to Cakanauto, myself one piece blue and orange print, twelve dollars.
>
> QARAINQIO,
> his × mark.
>
> Witnesses:
> JOHN H. DANFORD.
> DAVID WALKER.
> (Answer, p. 102.)

At these respective dates Cokana Uto and Qarainqio were rebels against and fugitives before the paramount chief of Rewa and, therefore, unable to give good title to Nukulau.

Koromovei and Korotabalea endorsed on this conveyance an acknowledgment and consent similar to that on the Laucala deeds.

Commander Boutwell endorses this deed as follows:

> Having examined this deed I consider John B. Williams' title to the land good.
>
> E. B. BOUTWELL,
> Commanding U. S. S. *John Adams*.
>
> Lauthala Roads,
> September 17, 1855.

Our observations therefore on the Laucala deeds of 1846 and our first three findings in that case apply to this claim also.

The claim therefore in this case is dismissed.

3. *Nukubalavu.*—This claim is different.

Kaibau and Koroiduadua, the grantors of this land under a conveyance of October 12, 1846, for a consideration of $46 in trade, were in a position to give a good title.

There is little or no evidence of dispute about the property, and, probably in consequence of that very fact, Commander Boutwell plays no part in this claim. As in the Nukulau case, the conveyance was to Williams, Breed and House, the two latter names having been erased wherever they occur throughout the deed, presumably by Williams who profited thereby. Having regard to the fact that these same erasures occur both in the Nukulau and the Nukubalavu deeds at an interval of four months, they must have been made after the execution of the latter deed. There is no evidence that Williams survived Breed and House. If, therefore, this deed were taken as creating a joint tenancy in the strict sense, this would be sufficient to defeat this claim. But in our opinion, it would be fairer and more in consonance with the real facts of the case and the intentions of the parties to treat the deed as creating a tenancy in common, with the result that the heirs of J. B. Williams are entitled only to one-third of the compensation which we find to be due in respect of the whole property. The range of value is very wide. The claim is for $10,000; the valuation of Messrs. Page, Scott and Joske in 1882 (Memorial, p. 390) is 2,000 pounds; that of Mr. Allardyce in 1898 (Answer, p. 26) is as follows:

> *Nukubalavu.*—This block is situated on the south coast of Vanualevu and is of no particular value. If put up to auction it would not fetch above a few pounds.

We think that the justice of the case would be met by an award of a lump sum of £150.

NOW THEREFORE:

The decision of the Tribunal in these cases is:

(1) *Laucala.*—That the claim of the Government of the United States of America be disallowed.

(2) *Nukulau.*—That the claim of the Government of the United States of America be disallowed.

(3) *Nukubalavu.*—That the British Government shall pay to the Government of the United States of America the sum of £150.

Dated at London, November 8, 1923.

The President of the Tribunal,
HENRI FROMAGEOT.

CASE OF ISAAC M. BROWER (CLAIM NO. 44)

Award rendered at London, November 14, 1923

Held, that the claimant had a proper title which should have been recognized by Great Britain, but as the islands which were the subject of the claim had only a speculative and precarious value only nominal damages were awarded.

This claim is presented by the United States on behalf of Isaac M. Brower for the sum of $1,250, with interest. It arises out of the disallowance of Brower's application for a Crown grant to certain lands in Fiji. The facts are as follows:

In 1863, two American citizens, Thompson and Gillam, purchased from a Fiji chieftain known as Tui Cakau, a group of small islands, six in number, forming a part of the Fijian group. The islands were designated on the charts as the Ringgold Islands, the native appellation being Yanuca-i-Lau, meaning "bad islands." They were not inhabited. Not more than three of them were of any potential value, the rest being described as "mere rocks" (Memorial, p. 439), or "sand banks" (Memorial, p. 424). The natives appear to have gone there intermittently to get turtles.

The circumstances surrounding the purchase were somewhat peculiar. Gillam and Thompson came to Fiji apparently with the idea that buried treasure existed on these islands. They first consulted with Brower, United States Consul, who directed them to Tui Cakau as the owner. They then bought the islands from Tui Cakau, paying $250, in Chilian ten-dollar gold pieces. The purchasers at once went to the islands and spent about two months digging over the ground evidently in a vain search for treasure. At the end of this period they abandoned the enterprise and went away from Fiji, leaving in Brower's hands a blank deed of sale. Brower subsequently sold under this deed to one Barber, who put an agent named Macomber in charge to maintain a sort of constructive possession with the intention of some day going there to occupy them. (Memorial, p. 423.)

In 1870, Brower bought a half interest from Barber for the sum of £30, and in 1873, the remaining half interest was sold to one Halstead.

On October 23, 1875, immediately after the cession of Fiji to Great Britain, Brower and Halstead applied for a Crown grant. In November, 1880, the application was denied by the Land Commissioners on the grounds of—

(1) Insufficient and fictitious occupation;

(2) Long-continued adverse occupation. (Memorial, p. 421.)

In 1881, at the request of Brower, there was a rehearing at which further evidence was adduced, and in October of that year a final judgment of disallowance was rendered.

Upon the final hearing in 1881, the attorney for Brower and Halstead asked leave to amend the petition and to substitute the names of two half-castes called Valentine for that of Brower; and the amendment was allowed. (Memorial, p. 431.)

Some three years previously it seems that Brower had entered into some arrangement, the terms of which are not found in the record, for the disposal of his interest to the Valentines for the sum of £100. After the failure to secure a Crown grant the Valentines sued Brower in the Supreme Court of Fiji for the repayment of the £100, and in August, 1884, recovered judgment. This phase of the subject is dealt with as follows in the report made by George H. Scidmore, United States Special Agent:

> Previous to the hearing of this claim by the Fiji Land Commission Brower entered into a contract with William Valentine and his two brothers (half-castes by an American father and native mother) for the sale of his (Brower's) interest in the islands, and received from the Valentines £100. Brower prosecuted the claim before the Commission in his own name, but failed to obtain a Crown Grant. He was subsequently sued in the Supreme Court of Fiji by the Valentines for the repayment of said £100, and, in August, 1884, they recovered judgment for that amount, with interest, and costs. (Memorial, p. 433.)

On these facts it is contended by counsel for Great Britain: first, that good title to the islands was never secured because Tui Cakau had no power to dispose of them; and second, that in any event no recovery in Brower's favor can be had because before final judgment in the proceedings for a Crown grant he had withdrawn in favor of the Valentines.

On the question of the chief's power to give title we are of opinion that the facts bring this case within the principles laid down in the decision of the Burt case already made by this Tribunal. Tui Cakau was conceded to be the paramount chief of the district in which the Ringgold Islands lay. Quoting again from the Scidmore report:

> Tui Cakau was paramount chief of Cakau-drove, and these islands were within his dominions. His capricious will was the supreme law there, and the time, labor, property, wives, children, and lives of his people were at his mercy. (Memorial, p. 434.)

The final judgment of disallowance states:

> We do not doubt that the purchase in question was honestly made nor that any rights which attach to the possession of the deed has, after passing through several hands properly vested in the present claimants. We are however of opinion that Tui Cakau had no right to sell these lands without the consent of the taukeis, . . . (Memorial, p. 431.)

The right of the paramount chiefs to sell without taukei consent has been fully dealt with in the opinion in the Burt case already mentioned.

It is hardly necessary in this connection to discuss the subject of occupation, for a careful examination of the record discloses nothing rising to the dignity of effective occupation either by natives or by the purchasers, although there is evidence indicating that the latter took steps to maintain possession by placing their agents from time to time upon the islands, and that Tui Cakau at their request on one or two occasions undertook to keep the natives off. The islands were to all intents and purposes uninhabited.

We consider therefore, that the title was vested in Brower and Halstead at the time of the cession to Great Britain.

The issue founded upon Brower's alleged withdrawal from the situation requires especial attention. Did the subsequent proceedings, particularly the Valentine transaction, operate to defeat his claim? We are somewhat in the dark as to just what took place between Brower and the Valentines. According to Scidmore, a contract for the sale of Brower's interest was entered into. Whether there was an out and out conveyance by deed is not clear. It may have been an arrangement conditioned upon the final issuance of a Crown grant. Whatever it was we may assume that the Valentines were regarded as the real parties in interest at the time of the substitution in 1881. The effect of the transaction was manifestly a matter of dispute; otherwise the subsequent litigation between Brower and the Valentines would not have taken place. It is contended that if Brower made a sale and the title failed because of the refusal to issue a Crown grant a proper pleading of this act of the state would have been a perfectly good defence to the Valentine suit for recovery of the purchase price and that therefore title cannot be regarded as having properly re-vested in Brower. The difficulty with this contention is that facts sufficient to support it are not before us. We do not know what the precise arrangement with the Valentines was; we do not know whether they brought suit for damages for breach of contract to convey or whether they sued for recovery of the purchase money under some condition expressed in the deed. We do not know whether the plea above referred to was made and disallowed by the court, or whether Brower neglected to take advantage of such a defence, if it existed. It seems idle to speculate on these matters in the absence of the facts. The most reasonable view is that Brower did try to dispose of his interest; that the transaction was upset by the failure to secure a Crown grant and that the final result was to place him exactly where he stood in the beginning. The effort to sell was abortive and he was obliged to pay back what he had received. We find no evidence that the title definitely passed to the Valentines and remained in them; but their complete disappearance from the situation raises an obvious presumption against the supposition that Brower's interest actually passed to them.

We hold that the title to a half interest in the Ringgold Islands was properly vested in Brower at the time of the cession to Great Britain; that this title should have been recognized by Great Britain as the succeeding power in the islands under the obligation assumed at the time of the cession; and that Brower was the holder of the title at the date of the filing of the claim against Great Britain by the United States.

Passing to the question of damages, it is plain that the islands forming the subject matter of this claim had only a speculative and precarious value. Nobody had ever taken the trouble to occupy and settle upon them. There is no evidence of any improvements. In their natural state they apparently formed only a fishing ground for turtle. The chart indicates that they were

little more than reefs or points of rock. Their value apparently rested entirely upon a rumor of buried treasure. The original purchase for a fantastic consideration paid in gold pieces is explainable on no other theory. The subsequent dealings were clearly based upon the same speculative consideration. The treasure tradition evidently persisted and the same fictitious valuation is reflected in the purchase by Brower of a half interest for £30, and in the purported transfer of that interest to the Valentines for £100. With the lapse of time the islands as such did not assume any real value, for as late as 1898, Mr. Allardyce, the Colonial Secretary and Receiver-General, made the following report upon them:

> These are six small islands of the Ringgold group. They are mere islets with a few cocoanut trees on them. They are situated in a remote portion of the Colony at a distance of about 180 miles from Suva. If put up to auction, I doubt if there would be a single bid for them. (Answer, p. 11.)

In these circumstances, we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages.

NOW THEREFORE:

The Tribunal decides that the British Government shall pay to the United States the nominal sum of one shilling.

Dated at London, November 14, 1923.

The President of the Tribunal,
HENRI FROMAGEOT.

EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED (CLAIM NO. 36)

Award rendered at London, November 9, 1923

Not only does the cutting of cables appear not to be prohibited by the rules of international law applicable to sea warfare, but such action may be considered to be implicitly justified by that right of legitimate defense which forms the basis of the rights of any belligerent nation.

The neutral owner of a cable which has been cut by a belligerent has no absolute right to compensation. In this case the company could not act as a neutral without violating its concession.

Cables which afford communication between different countries and nations are no more international in character than a packet boat or any other ship trading between various countries.

It is perfectly legitimate for a government, in the absence of any special agreement to the contrary, to afford to subjects of any particular government treatment which is refused to subjects of other governments, or to reserve to its own subjects treatment which is not afforded to foreigners. Some political motive, some service rendered, some traditional bond of friendship, some reciprocal treatment in the past or in the present, may furnish the ground for discrimination.

It is not the duty of this Tribunal to lay down new rules governing the matter of cable cutting.

This is a claim presented by His Britannic Majesty's Government on behalf of the Eastern Extension, Australasia and China Telegraph Company

Limited, a British corporation, for a sum of £912 5*s.* 6*d.*, being the amount which this company had to expend upon the repair of the Manila-Hong Kong and the Manila-Capiz submarine telegraph cables which had been cut by the United States naval authorities during the Spanish-American War in 1898.

The facts are as follows:

Under concessions granted by the Spanish Government and dated respectively December 14, 1878 and April 14, 1897, the Eastern Extension Company had laid down certain submarine telegraph cables connecting Manila and Hong Kong and Manila and Capiz, which the company was operating in 1898.

In April, 1898, war broke out between the United States and Spain, and on May 1, 1898, the United States naval forces, under the command of Commodore, afterwards Admiral, Dewey, entered Manila Bay and destroyed or captured the Spanish warships lying in that harbor. On the same day (United States Answer, p. 14, Exhibit 5) Commodore Dewey, through the British consul at Manila, proposed to the Spanish Captain General that both the United States and the Spanish authorities should be allowed to transmit messages by cable to Hong Kong. That proposition having been refused, on the morning of the following day, viz., on May 2, 1898, the Manila-Hong Kong cable was cut by order of the American Commodore, this cutting being effected within Manila Bay and consequently within the territorial waters of the enemy.

On May 10 the company, acting on a formal order of the Spanish Government under the provisions of the concession above referred to, sealed the end of the cable at Hong Kong, thereby preventing any use of the cable by the United States forces. Subsequently, the United States Navy Department proposed to the company to reëstablish cable communication between Manila and Hong Kong, and the company refused, informing the American Navy Department that the company was under the orders of the Spanish Government and that the transmission of messages from the Phillippine Islands to Hong Kong had been prohibited by that government (United States Answer, p. 12, Exhibit 2). Furthermore, as appears from the oral argument on behalf of His Britannic Majesty's Government (Notes of the 11th sitting, p. 251), the British Government themselves, acting in the interests of shipping, subsequently asked the Madrid Government if they would consent to the reopening of the cables; but the Spanish Government refused to accede to this request, except on terms which the United States could not accept.

On May 23 the Manila-Capiz cable was cut, also inside Manila Bay.

These facts are not contested; and further it is admitted on behalf of Great Britain that the severance of the cable between Manila and Hong Kong, as well as between Manila and Capiz, was a proper military measure on the part of the United States, taken with the important object of inter-

rupting communication whether with other parts of the Spanish possessions in the Philippine Islands or with the Spanish Government and the outside world.

The question is whether or not the United States Government is bound to pay to the company, as damages, the cost incurred by the company in repairing the cables.

The British Government admits that there was not in existence in 1898 any treaty or any rule of international law imposing on the United States the legal obligation to pay compensation for the cutting of these cables; but they contend that, under Article 7 of the special agreement establishing this Tribunal, such compensation may be awarded on the ground of equity, and that the United States Government, having paid compensation to some other foreign cable company for similar cuttings during the same war, is, therefore, legally bound to compensate the British company and, finally, that in the absence of any rule of international law on the point, it is within the powers, if it be not the duty, of this Tribunal to lay down such a rule.

The United States Government contends that the cutting of the cables by its naval authorities was a necessity of war giving rise to no obligation to make compensation therefor; that the United States were entitled to treat the said cables as having the character of enemy property, on the ground that their terminals were within enemy territory and under the control of the enemy's military authorities, and that the sealing of the terminal at Hong Kong, on neutral territory, was a hostile act of itself impressing this cable with enemy character. Further, the United States Government contends that there is no rule of international law imposing any legal liability on the United States, but that, on the contrary, the action of the United States naval authorities and the refusal to pay compensation are justified by international law and that the United States Government is not bound to pay compensation to the British company merely because more favorable treatment was meted out to another foreign company, the facts underlying whose claim were, in any case, different. Further, the United States Government say that it is not the duty, nor within the power, of this Tribunal to lay down any new rule of international law, but only to construe and apply such rules or principles as existed at the time of the cutting of these cables.

It may be said that Article 15 of the International Convention for the Protection of Submarine Cables of 1884, enunciating the principle of the freedom of governments in time of war, had thereby recognized that there was no special limitation, by way of obligatory compensation or otherwise, to their right of dealing with submarine cables in time of war. In our opinion, however, even assuming that there was in 1898 no treaty and no specific rule of international law formulated as the expression of a universally recognized rule governing the case of the cutting of cables by belligerents, it cannot be said that there is no principle of international law applicable.

International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between states as between private individuals.

Now, it is almost unnecessary to recall that principle of international law which recognizes that the legitimate object of sea warfare is to deprive the enemy of those means of communication, which the high seas, in their character as *res nullius* or *res communis* afford to every nation. The user by the enemy of that communication by sea, every belligerent, if he can, is entitled to prevent, subject to a due respect for innocent neutral trade; he is even entitled to prevent its user by neutrals, who use it to afford assistance to the enemy either by carrying contraband, by communicating with blockaded coasts, or by transporting hostile despatches, troops, enemy agents, and so on. In such cases the neutrals do not, properly speaking, lose their neutral character; but their action itself loses that character, such action being, as it is said, impressed with a hostile character. Thus it may be said that a belligerent's principal object in maritime warfare is to deprive the enemy of communication over the high seas, while preserving it unimpeded for himself.

It is difficult to contend in the same breath that a belligerent is justified by international law in depriving the enemy of the benefit of the freedom of the high seas, but is not justified in depriving him of the use of the seas by means of telegraphic cables.

Not only does the cutting of cables appear not to be prohibited by the rules of international law applicable to sea warfare, but such action may be said to be implicitly justified by that right of legitimate defence which forms the basis of the rights of any belligerent nation.

It is contended, however, that the cutting, however legitimate, may create an obligation to compensate the neutral owner of the cable; and various instances are, or may be, given of legitimate acts which, it is said, do create such an obligation. We do not think that the instances given furnish a just analogy. In those instances, the right is not absolute, but limited; and is in reality only itself acquired in consideration of the payment of compensation, and has no existence as a right apart from the obligation to make compensation. Such is the case in respect of requisition, either for the purposes of ownership or user; of expropriations, or, to take a case from maritime law, of the exercise of the right of angary.

Reference has been made to certain opinions (Dupuis, *Revue Générale du Droit International Public*, Vol. 10, p. 546) which seem to suggest that in the

case of cables which connect enemy and neutral territories and are the property of neutrals, the right of a belligerent to cut ought to be exercised subject to the obligation to pay compensation, since it is not certain that the transmission of messages by the enemy over the cable has the consent of the neutral owner, against whom the belligerent is acting, and who may in fact be innocent. In such a case, it is suggested, the neutral owner of a cable is in the same position as the neutral owner of cargo which may or may not be used for warlike purposes and against whom there is no evidence of intention to assist the enemy, and who, if such cargo be seized, must be paid for it. In the first place it is a matter of controversy whether or not such rule as to the neutral owner of such cargo in fact exists; secondly, such a rule, if it does exist, is in practice inapplicable to submarine cables, having regard to their peculiar character; thirdly, the facts postulated for the application of the suggested rule do not exist in this case.

The cables in this case were laid and operated, not only by permission or concession granted to a neutral by the Spanish Government, but they were, under those concessions, legally to be considered from the Spanish point of view as "works of public utility" (Schedule of Conditions of March 28, 1898, Article 3). The Spanish Government expressly reserved to itself "the right of organizing over the cable service such a system of supervision as it deems best." (*Ibidem*, Article 4; Schedule of Conditions of December 14, 1878, Article 8). The receiving and transmitting stations had to be situated in the offices of the state (Conditions of 1878, Article 6). The Spanish Government had reserved the right, belonging in any case to any state over its own national telegraph lines, and recognized by international telegraph conventions, of suspending the transmission of messages dangerous to the security of the state (Conditions of 1878, Article 12); and it was expressly stipulated that the operation of the cable was to be carried out at the risk of the company which received in exchange certain privileges, a certain monopoly, and certain exemptions from taxes and imposts (Conditions of 1898, Article 3). Finally, the order given to the company to seal the terminal at Hong Kong and the mere fact that the company considered itself legally bound to obey that order, notwithstanding the fact that this terminal was in a neutral country, the refusals of the company and the Spanish Government, made respectively to the United States Government and to the British Government, to reopen the lines, appear to be conclusive evidence that the company was in reality operating, not in the character of a private neutral commercial undertaking subject only to certain local regulations, but as an actual Spanish public service, as completely under the authority of the Spanish Government as would have been any state service. In such circumstances it does not seem possible to regard this company as ignorant of, or as not having consented to, the use of the cable for military purposes by the Spanish military authorities, or as entitled to avail itself of neutral character in order to claim compensation for the cutting of its cables. The

fact is that this company could not act as a neutral, without violating its concession.

It has been said (see the opinion of Sir Robert T. Reid and Mr. Henry Sutton, British Memorial, pp. 12 and 13) that if the cables had been the ordinary property of neutrals, that fact, under the ordinary rule, would have been fatal to this claim, but that the ordinary rule does not apply to such property as these cables, which are of an international character. But it seems difficult to concede such international character to these cables which were under the absolute control and authority of a particular state. If they afforded communication between different countries and nations and, in that sense, were international, they were not more international than a packet boat or any other ship trading between various countries.

According to the terms of the concessions, these cables possessed the character of Spanish works of public utility, and if, as private ordinary property, they were subject to destruction without compensation in case of necessity of war, *à fortiori* they were so as an enemy public utility undertaking.

As to the contention that, having regard to the terms of Article 7 of the special agreement providing for the settlement of these claims, this Tribunal is to decide "in accordance with treaty rights and with the principles of international law and of equity," compensation in this case should be paid on the ground of equity, the following observations may be made.

If the strict application of a treaty or of a specific rule of international law conduct to a decision which, however justified from a strictly legal point of view, will result in hardship, unjustified having regard to the special circumstances of the case, then it is the duty of this Tribunal to do their best to avoid such a result, so far as it may be possible, by recommending for instance some course of action by way of grace on the part of the respondent government.

In this case it is to be observed that the Eastern Extension Company was well aware of its own risk in Spanish territory. As has been shown, their concessions expressly provided for it. The various advantages, privileges, exemptions and subsidies, accorded them by the Spanish Government, form the consideration in exchange for which the company assumed the risk of being treated in time of war as a Spanish public service with all the consequences which that position implied.

In the opinion of this Tribunal, there is no ground of equity, upon which the United States should be adjudged to pay compensation for the materialization of this risk in the form of an act of war the legitimacy of which is admitted.

The British Government contend that, as a matter of right, the Eastern Extension Company is entitled to receive compensation because some other foreign cable company, viz., *La Compagnie française des Câbles télégraphiques*, working cables between the United States of America, Haiti and Cuba, received from the United States Government compensation for the cutting of

its cables. It is urged that, when acts of war by a belligerent have resulted in personal injury to individuals in certain territory or in damage to their property in that territory, if the government of that territory pays the claims of the nationals of one country, it must also pay the claims of the nationals of other countries without discrimination (Oral Argument, pp. 261 and 262); and further, as the argument would seem to imply (Oral Argument, p. 264), that, if it be established that a government has paid compensation to its own citizens, then it is bound to pay compensation to foreigners whose person or property was damaged; and authority is said to be found for the last proposition in cases arising out of the Mexican insurrection.

Whether viewed as a general principle, or in its particular application to the facts of this claim, such a proposition appears to us to be impossible of acceptance. It is perfectly legitimate for a government, in the absence of any special agreement to the contrary, to afford to subjects of any particular government treatment which is refused to the subjects of other governments, or to reserve to its own subjects treatment which is not afforded to foreigners. Some political motive, some service rendered, some traditional bond of friendship, some reciprocal treatment in the past or in the present, may furnish the ground for discrimination. We do not know that the provisions of the French or Belgian law, reserving to their own nationals a right to reparation for war losses, gave rise, or could give rise, to any protest by resident foreigners, any more than could the fact that, by special agreement, the Belgians in France and the French in Belgium have been reciprocally admitted to the same treatment in their respective countries. An instance of such discrimination is furnished by the proclamation of Lord Kitchener of Khartoum, dated May 31, 1902, on the final surrender of the Boer forces. In that instrument it is provided (paragraph 10) that a commission would be appointed for the purpose of assisting the restoration of the people to their homes and helping those who, owing to war losses, were unable to provide for themselves; and that for that purpose a sum of money should be placed at the disposal of the commission. The final clause of that paragraph provides as follows: "No foreigner or rebel will be entitled to the benefits of this clause."

It appears from the documents in this case that the repairs of the French cables in question had been effected with all expedition and at the express request of the United States authorities and for American strategic purposes (Senate Document, No. 16, 58th Congress, 2nd Session, pp. 22 and 23); that, unlike the British cables, the French cables were used by the American naval authorities and had afforded them direct communication with President McKinley (*Ibidem*); and that the French cable company had rendered the United States valuable services during the operations of 1898 (Letters from the French Embassy at Washington, November 15, 1901; November 28, 1902; February 19, 1903; March 12, 1903).

There is no evidence that the Eastern Extension Company can avail itself

of a similar plea. The French case is a good example of the payment of compensation, on grounds of equity and comity, which did not exist in the British case.

From these considerations it does not appear that the contention of the British Government on this point is in any way justified.

As to the contention of the British Government that, in the absence of any rule governing the matter of cable cutting, it is the duty of this Tribunal to frame a new rule, we desire to say:

First, the duty of this Tribunal, in our opinion, under Article 7 of the special agreement, is not to lay down new rules. Such rules could not have retroactive effect, nor could they be considered as being anything more than a personal expression of opinion by members of a particular Tribunal, deriving its authority from only two governments;

Secondly, in any case this Tribunal, as has been already stated, is of opinion that the principles of international law, applicable to maritime warfare, existing in 1898, are sufficient to enable us to decide this case.

NOW THEREFORE:

The Tribunal decides that the claim of His Britannic Majesty's Government be disallowed.

Dated at London, November 9, 1923.

The President of the Tribunal,
HENRI FROMAGEOT.

CASE OF THE CUBA SUBMARINE TELEGRAPH COMPANY, LIMITED (CLAIM NO. 27)

Award rendered at London, November 9, 1923

The contentions and applicable principles in this case are practically the same as in the claim of the Eastern Extension, Australasia and China Telegraph Co., except that in this case the company's enterprise as a Spanish public service having a military and strategic interest is more clearly apparent. The right of the United States to take measures of admittedly legitimate defense against these means of enemy communication was fully justified.

Not only is there no ground of equity upon which an award should be made against the United States, but equity appears to be on the side of the United States in their refusal to pay the damages claimed.

This is a claim presented by His Britannic Majesty's Government on behalf of the Cuba Submarine Telegraph Company Limited, a British corporation, for a sum of £8,174 17*s.* 9*d.*, being the amount which this company had to expend upon the restoration of the submarine cables, connecting various places on the island of Cuba, which had been cut by the United States naval authorities during the Spanish-American War of 1898.

The facts are as follows:

Under concessions granted by the Spanish Government and respectively dated December 31, 1869, and September 29/30, 1895, the Cuba Submarine

Telegraph Company was operating in 1898 certain submarine telegraph cables connecting Habana, Santiago de Cuba, Cienfuegos, Manzanillo and various other places in the island of Cuba.

In April, 1898, war broke out between the United States and Spain. At the very beginning of the war a proclamation of the President of the United States, dated April 22, 1898, declared a blockade of the north coast of Cuba, including all ports on that coast between Cardenas and Bahia Honda and the port of Cienfuegos on the south coast of Cuba. That blockade was maintained from that time by the United States naval forces.

On May 11, 1898, by command of the United States superior naval officer, the cables on the eastern side of Colorado Point at the entrance to Cienfuegos Harbor were cut and the cable house on land was destroyed by the American naval forces under heavy fire and in circumstances of considerable difficulty. All communication by ocean cable with Cienfuegos was thus interrupted. On July 11, 1898, the cable connecting Santa Cruz del Sur, Trinidad, Cienfuegos and Habana with the stronghold of Manzanillo on the east of Cuba was similarly cut in the San Juan Channel; this cutting not only prevented telegraphic communication between the above-mentioned points, but, according to the report addressed to the American commanding officer, was to have the great moral effect of checking the inland traffic with Manzanillo and certainly to prevent the calling of reinforcements then in the west to resist the ultimate American attack and the capture of Manzanillo. It may be observed that all these cuttings took place inside enemy territorial waters.

These facts are not contested; nor, from the point of view of the successful conduct of operations by the United States naval and military forces in Cuba, is the importance of interrupting the telegraphic communications between enemy ports denied.

As in the case of the Eastern Extension, Australasia and China Telegraph Company, the question is whether or not the United States Government is bound to pay as damages to the Cuba Company the cost of repairing the said cables and appurtenances.

The contentions of the British Government and of the United States Government are practically the same in both cases, and it would be superfluous to repeat all that has been said in this Tribunal's decision relating to the Eastern Extension Company's claim as to the application of international law, equity, the treatment afforded by the United States Government to the French cable company and the alleged duty of this Tribunal to frame some new rule of international law on this subject. It seems to be sufficient to refer to that decision.

Some particular remarks may, however, be made.

In this case the character of the company's enterprise as a Spanish public service having a military and strategic interest is more clearly apparent. The transmission of the official correspondence of the Spanish Government was obligatory and gratuitous, the managers and directors being appointed

by that government (Schedule of 1869, Articles 4 and 11); inspection of any kind of the contents of the official communications was prohibited; Spanish authorities had the right to inspect every description of correspondence and to refuse to allow the forwarding of despatches prejudicial to the security of the state; all ciphers or secret keys were excluded from all private correspondence (Article 12 *ibidem*); but, going further still, the service and preservation of the line within the Spanish dominions were reserved to the Spanish authorities and when, in 1895, some new cables were conceded to the Cuba Company, it was expressly explained in the report presented on September 27, 1895, to Her Majesty the Queen Regent of Spain by the Spanish Minister of Colonies, that the cables were to be laid in order to remove some military difficulties presented by the existing land lines and specified by the Spanish military superior authorities. It was, therefore, according to that report, "indispensable to meet this necessity by replacing the land telegraph lines by submarine cables, which will permit the maintenance at all times of connection and communication between the strategic points of the island;" and among them, those situated on the south coast between Cienfuegos and Santiago de Cuba were mentioned as being not of less need and importance.

In these circumstances the right of the United States to take measures of admittedly legitimate defence against these means of enemy communication was fully justified; if some compensation was due to the company for the damage done to the cable, it was for the Spanish Government to make it, always supposing that such compensation had not been already considered in the terms agreed upon under the concessions. In our opinion, not only is there no ground of equity upon which an award should be made against the United States, but equity appears to us to be on the side of the United States in their refusal to pay the damages claimed.

NOW THEREFORE:

The Tribunal decides that the claim be disallowed.

Dated at London, November 9, 1923.

The President of the Tribunal,
HENRI FROMAGEOT.

BOOK REVIEWS AND NOTES*

The Genesis of the War. By the Right Honorable Herbert Henry Asquith. New York: George H. Doran Company, 1923. pp. ix, 405. $6.00

This book may justly be considered as England's authoritative statement of her case regarding the origin of the World War. Mr. Asquith is the one Englishman who, in the critical years preceding its outbreak, had opportunity for the widest information and bore the heaviest burden of responsibility relating to this subject. He has stated the case coolly and clearly, and with the skill of a trained parliamentarian.

In order to present a background on which to lay in the lines and colors of his picture, Mr. Asquith takes the reader back to the year 1888. In the period 1900–1908, covering the chancellorship of von Bülow, he preoccupies himself chiefly with the behavior of Germany, with very little attention to the conduct either of England or other Powers. It is a skillful preparation for a criminal indictment, with such index-fingers pointing toward it as these quotations:

> The Kaiser's remark to a Cabinet colleague of Lord Salisbury—"Lord Salisbury is antiquated. He is possessed by the idea that there is a balance of power in Europe. There is no balance of power in Europe, except *Me*—me and my 25 corps"; and Prince von Bülow's dictum regarding the basis of imperial policy—"In the new century, Germany must be the hammer or the anvil."

Prince Bülow's myth of "Encirclement" is very ingeniously run to ground through the exposure of the Emperor's own absurd account of its origin in the secret treaty alleged to have been made in 1897 between America, England and France. *Ex uno, disce omnes,* is the inference from this preposterous pretense put forward in the Kaiser's *Memoirs,* and here elaborately refuted by solemn denials from the Foreign Offices of three nations,—an array of testimony which suggests the employment of a trip-hammer to kill a mosquito. Quite as conclusively Mr. Asquith contends that the German exploitation of Turkey (so happily referred to by Bülow as the "Wooing of Islam"), the fomenting of differences in the Balkans, the close friendship of the Emperor with the two German-Austrian Kings of Rumania and Bulgaria, thus opening for Germany a "corridor" for trade and influence in the East,—in short, the whole unresisted procedure of *Weltpolitik,*—prove that, if there ever was a policy of "Encirclement," it had proved to be a complete failure before Prince Bülow left office in 1909.

Having thus dismissed the fiction of "Encirclement" as a mere halluci-

*The JOURNAL assumes no responsibility for the views expressed in signed or unsigned book reviews or notes.

nation, Mr. Asquith proceeds to explain the real nature of the Triple Entente. In April, 1904, "the last causes of friction" between Great Britain and France were removed by mutual concessions regarding the interests of the two nations in Morocco and Egypt. This agreement is claimed to have been purely a work of reconciliation and peaceful adjustment of long standing difficulties between these two Powers, involving no intention to isolate Germany. How little formidable it was as a menace to German interests is shown by the fact that Delcassé, who had signed the agreement for France, was soon afterward dismissed from office as an assurance of good will toward Germany; and Prince Bülow declared in the Reichstag, that, "from the point of view of German interests, we have nothing to object to in regard to it." The Anglo-Russian convention of August, 1907, is held to have been a similar act of reconciliation between the signatory Powers, having no relation to the isolation of Germany. It terminated the Russian menace to India, and thus dissipated a war-cloud that had for generations haunted the minds of British statesmen and diplomatists.

As to the further development of the Entente, Mr. Asquith cites the explicit admission of Prince Bülow, "It was not till the outbreak of War that the Triple Entente became a solid coalition." That there was no alliance against Germany is conclusively shown by the letter of President Poincaré, of July 31, 1914, addressed to King George V, urging the intervention of Great Britain in case a conflict were forced by Germany and Austria. The actual status of the Entente at that critical moment is thus stated by the President of France in asking for British intervention:

> Undoubtedly our military and naval engagements leave Your Majesty's Government entirely free, and in the letters exchanged in 1912 between Sir E. Grey and M. Paul Cambon, Great Britain and France are merely pledged the one to the other to conversations in the event of European tension, with a view to considering whether there is ground for common action.

That the military and naval experts of the two Powers had compared notes and considered beforehand "the possibilities which might arise in the event of a breach of the peace," is frankly stated, and the text of the formula agreed upon in 1912 is given. In case of unprovoked attack by a third Power, either government should immediately discuss with the other whether both governments should act together

> to prevent aggression and to preserve peace, and if so, what measures they would be prepared to take in common. If these measures involved action, the plans of the General Staffs would at once be taken into consideration, and the Governments would then decide what effect should be given to them.

Was there reason for this understanding? "The larger purposes of the Hague Conferences—disarmament in particular"—writes the Prime Minister, "were frustrated by divided counsels and the veto of Germany. The

situation was full of menacing possibilities from the piling up of armaments." Germany's new and persistent naval ambitions could have but one explanation for the English Government. British supremacy on the sea was clearly threatened. "We prepared," says Mr. Asquith, "by the reconstruction of our army and large additions to our navy, for the worst eventualities."

No one can doubt, after reading this account of the *Genesis of the War*, that in 1914 Great Britain was as fully prepared as her resources permitted for the "worst eventualities." It would be a confession of weakness on the part of Mr. Asquith's Government to conceal this fact, and there is no concealment. On the other hand, there appears to be no exaggeration. The chapters on "Pre-War Preparations" are among the most informing in the book.

Naturally, much attention is given to the "Naval Expansion of Germany." As early as 1897, in a speech made at Koln, on April 4, the Kaiser had declared: "Neptune with the trident is a symbol that we have new tasks to perform . . . and that trident must be in our hands." The growth of the German navy is followed in much detail. The Morocco incidents, the Haldane mission, and other episodes with which the public is familiar are fully discussed; but what lends to them a new interest is the incidental illumination of British policy, not only that of the Asquith ministry, but the necessarily permanent policy of the British Empire so long as it remains an empire.

The two chapters in this volume most interesting to those who are attentive to contemporary national policies are those devoted respectively to "The Committee of Defense" and "The Dominions in Council." At this point the Prime Minister invites us to sit briefly with the Cabinet and listen to its deliberations.

It will be a surprise to many to learn with what meticulous care British statesmanship studies every situation affecting the possibilities of war. For this purpose the ablest and most experienced experts are employed. In August, 1909, says Mr. Asquith, "it would not be an unjust claim to say that the Government had by that date investigated the whole of the ground covered by a possible war with Germany:—the naval position; the possibilities of blockade; the invasion problem; the Continental problem; the Egyptian problem." It is impossible here to enumerate all the activities involved in this form of preparation. "I am not sure," he writes, "that the compilation of the War Book was not the most important step of all. Into the War Book, which was started in 1910, we incorporated all the predetermined action, decided upon as the result of the innumerable inquiries, in the contingency of war." This War Book was carefully kept up to date. Draft Orders in Council everywhere accompanied the King on his travels in time of peace and were kept set up in type, "so that on a sudden outbreak of war they could be circulated and put into operation at a moment's notice."

In 1909 the representatives of the Dominions were invited to sit with the Committee of Imperial Defense. It was the beginning of a new order of things in the empire. In May, 1911, Sir Edward Grey, in the presence of these representatives, stressed the necessity of a common foreign policy for the whole empire. In his discourse on that subject Sir Edward said: "What really determines the foreign policy of this country is the question of sea power. It is the naval question which underlies the whole of our foreign policy, and more than our foreign policy." And this statement was reinforced by the assertion that "the creation of separate fleets has made it essential that the foreign policy of the Empire should be a common policy. If it is to be a common policy," he continued, "it is obviously one on which the Dominions must be taken into consultation, which they must know, which they must understand, and which they must approve." The "common policy" for the preservation of the empire was pointed out to be, to prevent the domination in Europe of some Power, or group of Powers, "which could eventually take the command of the sea from us." And Mr. McKenna defined what was meant by "command of the sea" as follows: "By command of the sea we understand keeping the sea open to ourselves at every point, and closing it to the enemy." And he adds: "The destruction of overseas trade in almost any modern state would be so serious as I believe to constitute something more than a crippling blow. On the outbreak of war our problem, which will be one and the same all the world over, would be to seek out, to bring to battle, or to mask the enemy fleet and enemy cruisers wherever they might be found."

Mr. Asquith does not preoccupy himself with any consideration of the question why Great Britain alone should be permitted to possess and exercise this indefeasible right to control the seas "all the world over." His exposition makes it very plain that until this right was challenged Great Britain's policy was one of peace. For Serbia or for Russia Great Britain would not have fought Austria or Germany, whatever their insolence or outrages might have been. But when Belgium and the Channel ports were involved, Great Britain's course was determined by the necessity of her secular policy.

The chapter on "Grey's Efforts for Peace" confirms this conclusion. No impartial critic can doubt the sincerity of those efforts. Great Britain did not want war, not even with Russia and France in the front line of battle, and Sir Edward Grey did everything in his power to avert it. Germany did nothing for peace except to advise Austria to be firm and to make Russia appear responsible for the conflagration that was foreseen, while she herself threatened Russia and made ignominious proposals for the neutrality of France. Of Great Britain Germany demanded nothing in the interest of peace. What she desired and for a time expected was the privilege of fighting France without British intervention.

DAVID JAYNE HILL.

Die Lehre von den Voelkerrechtlichen Vertragsurkunden. By Ludwig Bittner. Deutsche Verlags-Anstalt, Stuttgart, 1924. pp. xiv, 314.

This book seems to the reviewer an example of ultra-Teutonic scholarship. Though dealing with an intensely practical subject, it would probably read to a man of affairs about like a doctor's thesis on the Greek particle ἄν. The effort expended in attempting to bring isolated forms and instances (some very unimportant ones) of diplomatic negotiation and international agreements into type groups and subject them to general norms is indeed tremendous. The footnotes alone give evidenc eof the twenty years of detail research which Professor Bittner has given to the documentation of his generalizations. It is just to the author to say that his generalizations and classifications are properly qualified with such words as "meist" or "oft", "mitunter," "eben so oft," "vielfach, wenigstens äusserlich," "doch kommt es auch vor," and the like. Indeed, after considerable generalization, he sometimes closes a section, as on page 113: "The contents of these notes cannot be brought within a definite classification (Schema). Most often it is the initiatory note (Antragsnote) that is substantively important, whereas the invitation and summons notes are useful in the preliminary technical preparations for the Conference, but this is not always necessarily so."

What is the value of such a generalization, for example, as this on pages 58–59:

> We will find the parties to these Ministerial documents (Urkunden) sometimes called heads of state and sometimes governments. Numerically the documents employing the term government are 90% and those designating the head of the state are 10% of the total. There is no apparent substantive or political basis for this difference in designation. Documents relating to the same subject sometimes use the term government and sometimes designate the head of the state. We may observe this in treaties relating to, . . .

duly supported by ample footnotes?

In view of modern tendencies and diplomatic practice since the Congress of Vienna, which is precisely the period this book aims to cover, it seems to the reviewer that any attempt at this late day to reduce the multiform methods of international negotiation to types and norms, will probably be regarded as barren scholasticism.

The almost total absence of any reference to English or American sources and the predominant Austro-Hungarian documentation (the author was for many years the archivist of that government) further restricts the practical value and perhaps also the authority of the book. An index would have made more accessible many of the interesting references to diplomatic incidents mentioned in the footnotes.

Comparisons are odious; still we venture to suggest that persons interested may contrast this book with Satow's Guide to Diplomatic Practice.

GEORGE C. BUTTE.

De Dominio Maris Dissertatio. By Cornelius van Bynkershoek. A Photographic Reproduction of the Second Edition (1744), with an English Translation by Ralph Van Deman Magoffin and an Introduction by James Brown Scott. (The Classics of International Law, No. 11.) New York: Oxford University Press, 1923. pp. 108+80. $2.00.

On August 30, 1923, the Supreme Court of the United States rendered a decision fixing three miles as the limit for executing the provisions of the Volstead Act.[1] It was not long, however, before the authorities recognized that this distance was insufficient for the effective enforcement of the Eighteenth Amendment to the Constitution. Then began that series of negotiations with foreign nations which culminated in treaty arrangements[2] for a limit of one hour's steaming from shore or approximately twelve miles. This limit was acknowledged only for the prevention of smuggling of intoxicating liquors. Otherwise, the high contracting parties have the "firm intention to uphold the principle that three marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters."[3]

The fundamental principal herein involved and the basis for its present extension was given nearly two centuries and a quarter ago by the Dutch jurist, Cornelius van Bynkershoek, in the little tractate which is here reprinted by the Carnegie Endowment for International Peace. In a brief but illuminating introduction, Dr. James Brown Scott says that Bynkershoek's thesis is twofold:

> First, that the ocean, or high sea, beyond cannon-shot from the shore, is subject to occupation and therefore ownership, although, in fact, it has not been occupied and has not therefore been brought under ownership; second, that a state can take possession of the waters washing its shores and hold such adversely against the world, as far as it can control and make that possession effective by cannon from its shores—that therefore, to the extent of the cannon-shot from shore, marginal waters are subject to possession, occupation and, therefore, ownership. In the days of Bynkershoek, a cannon carried approximately three miles; hence the statement that a nation may occupy and exercise ownership over waters within three miles of low-water mark. This was the solution proposed by the young publicist; this was the solution accepted by the nations; this is the solution still obtaining, unless modified by expressed consent.

[1] New York *Times*, May 1, 1923, p. 1.

[2] Treaties ratified with Great Britain (U. S. Treaty Series, No. 685); with Denmark (U. S. Treaty Series, No. 693); and with Norway (U. S. Treaty Series, No. 689). Treaties signed, but not ratified at the date this was written, with France, Germany, Italy, Netherlands, Panama and Sweden. A test case involving the interpretation of the treaty with Great Britain seems to be in prospect from an information filed in New York City on Sept. 29, 1924, against the master and crew of the 30-foot motor boat K-14622, the point at issue being the speed of the motor boat, about 30 miles, over twice as much as the 12 miles generally recognized as one hour's steaming.

[3] U. S. Treaty Series, No. 685; Supplement to this JOURNAL, Vol. 18 (1924), p. 128.

Bynkershoek himself in his solution of the question suggests the possibility of some modification of this limit, when he says:

> I am speaking, however, of our own times, in which we use those engines of war; otherwise I should have to say in general terms that the control from the land ends where the power of men's weapons ends, for it is this, as we have said, that guarentees possession.

It is a tribute to the author's soundness of thought that the principle laid down by him has exercised its influence on the law of nations to this very day.[4]

The photographic reproduction of the original Latin text presents an excellent appearance and Professor Magoffin's scholarly translation puts the tractate at the ready disposal of the man of affairs. If the General Editor of the series needed any justification for his vision in republishing the classic works of international law, the timeliness of the volume before us should give him ample satisfaction.

HERBERT F. WRIGHT.

Leading Cases on International Law. By Pitt Cobbett. 4th ed. Vol. II. War and Neutrality. Edited by Hugh H. L. Bellot. London: Sweet and Maxwell, 1924. pp. xxxviii, 690. 25 shillings net.

The volume on Peace appeared in 1922. The present volume, like its predecessor, presents international incidents in brief form, appends to each a short commentary, and, besides, inserts about forty compact treatises dealing with pertinent topics.

Naturally enough, considering the present state of the world and of international law, the volume on War and Neutrality is almost twice as large as the volume on Peace, and states almost twice as many international incidents. In the volume on Peace the incidents numbered fifty-eight. In the present volume, they number one hundred and ten. Of the one hundred and ten, seventy-six are cases litigated in ordinary courts—sixty-one in English courts, twelve in American courts, and three in Japanese courts. In the cases litigated in England and Japan, there are at least five of special importance to Americans. Besides, the United States was interested in thirteen of the thirty-four incidents that did not go to ordinary courts.

Obviously, the volume contains much that an American may read with peculiar profit. No one but a specialist can be expected to read the whole of it; and even the parts of special value to Americans cover so many pages that it seems advisable to point out that there are a few passages which the

[4] Pitman B. Potter, *The Freedom of the Seas in History, Law and Politics* (N. Y., 1924), p. 91. *Cf.* also Henry G. Crocker (ed.), *The Extent of the Marginal Sea:* A Collection of Official Documents and Views of Representative Publicists (Washington, 1919).

American interested even slightly in international affairs cannot afford to ignore. The irreducible minimum of reading includes the enemy character of corporations (pp. 31–37), enemy persons and property found within the territory of a belligerent (pp. 62–82), the nature and functions of prize courts (pp. 279–299), the Geneva Arbitration (pp. 451–477), national neutrality laws (pp. 500–512), and the doctrine of continuous voyage (pp. 613–640).

Has this volume been published too soon after the World War?

There is something to be said on each side of that question.

On the one hand, it seems clear that the editor has found it possible to restrain expression of emotion. There is little if any use of abusive epithet. The German invasion of Belgium, for example, is stated with scientific exactness (p. 443); and the most sensitive German will probably express no criticism beyond a wish that the English seizure of the Danish fleet in 1807 might have been mentioned, and might then have been distinguished on some such ground as a hundred years of difference in international theory.

On the other hand, as the preface points out, the nearness of the World War has caused some perplexity as to the mode of dealing with the Declaration of London and certain British Retaliatory Orders in Council. The Declaration of London, framed by the Naval Conference of 1909, attempted to lay down the laws of naval war; but some of the laws stated were subjects of dispute, and, as the Declaration of London was a compromise between opposing views on several subjects, there was an express agreement that "the provisions of the present Declaration must be treated as a whole and cannot be separated" (Art. 65). No country has ratified the Declaration of London as yet. By Order in Council, Great Britain on August 20, 1914, announced that the Declaration of London, not as a whole, but subject to "additions and modifications," should be put in force "as if the same had been ratified." France and Russia did likewise. The United States protested on October 22, 1914. Later Orders in Council introduced still other "additions and modifications," "rendered necessary by the special conditions of the present war." Finally, by Order in Council, on July 7, 1916, all those Orders in Council were withdrawn, and it was declared "that it is and always has been" the intention to exercise "belligerent rights at sea in strict accordance with the law of nations." The documents may be found in *Diplomatic Correspondence between the United States and Belligerent Governments relating to Neutral Rights and Commerce* (*Special Supplements to the American Journal of International Law, Vols. 9 and 10*). That ultimate Order in Council came none too soon; for on April 7, 1916, the decision of the Judicial Committee of the Privy Council, in *The Zamora*, had shown that Orders in Council cannot change international law. So it happens that proceedings under the Orders in Council as to the Declaration of London, whether those proceedings were judicial or otherwise, are of doubtful value, even in Great Britain. Possibly, much the same may be

said of the Retaliatory Orders in Council. The World War is so recent that such points have not yet taken their permanent place in scientific discussion.

Bearing all this in mind, the judicious reader will probably conclude that, as the editor has good temper and has tried to cover the ground with accuracy, this embarrassing piece of work has not been performed prematurely; and, at any rate, it is useful both in form and in substance.

EUGENE WAMBAUGH.

International Law. By Prof. Charles G. Fenwick. New York: The Century Company, 1924. pp. xxxvii, 641, including appendices and index. $4.00.

In this volume Prof. Fenwick has pursued a convenient method of arrangement, discussing in successive order and with appropriate subdivisions the science of international law—its historical background, nature and scope, development, determination of content, and relation to municipal law; persons of international law—membership and acquisition in the family of nations, continuity and loss; substantive international law—rights and equality of international persons, rights of existence and independence and jurisdiction over persons and vessels, extradition of criminals and jurisdiction over territory and of air above national territory, the high seas, external independence and treaties, agents of international intercourse, remedial rights and responsibility of international persons; international procedure for the protection of rights—peaceable and forcible falling short of war and by war, war's effect upon normal relations of belligerent states, and law of land and maritime warfare, relation of neutral states to belligerents, with neutral rights, conflict of rights as to blockade and contraband, neutral duties, aerial warfare and termination of war. Appendices include the Covenant of the League of Nations, Statute of the Permanent Court of International Justice, and Select References.

With some apparent misgivings, especially shown by the fact that he attaches an entirely secondary importance to the so-called laws of war, Prof. Fenwick treats of international law as if today it approached the dignity of a science. Yet one must rise from the reading of his book with the conclusion that at this time it is but an empirical art, the materials and application of its instances still to be worked out upon some basis only dimly perceived. To its development as a science the writers of this JOURNAL are devoted, and to this end the work of Prof. Fenwick of course contributes. Perhaps under the circumstances, and bearing in mind its purposes, nothing more was to be expected than the book gives, for in the preface the author says amendments of the law are beyond "the scope of the present volume. Its implications are, indeed, suggested here and there when glaring defects are under consideration; but beyond this it has been neither feasible nor desirable to make constructive proposals. Reforms will be more rapidly forthcoming once the

knowledge of present conditions has become more general." A distressed world has brought home to the most stupid, knowledge of the fact that the international law of the day has egregiously failed. How mere dress rehearsals of the facts are going to accomplish much is not obvious to this reviewer. The world at large and the college classroom as well will demand more filling pabulum.

Bowing courteously to the set opinions of the leaders of the past and their equally blind followers of today, Prof. Fenwick does not condemn but tentatively accepts the validity and legality of war as an instrumentality. Euphemistically he calls it a means of "self-help" or a means of obtaining a "redress of grievances," and "legal" or "lawful." This reviewer would deny that it is any of these things, but, it may be within the lines of future thought, would urge that war is merely a fact in the world of today, and in its way as much a violation of law as perhaps are all of our physical ills, except old age. If the author had said that the nations think it a means of self-help, or, in other words, of profiting at the expense of weaker nations, or that under false pretenses nations use it to relieve their complaints, mostly imaginary, just as savages resort to self mutilations, he would have been nearer right.

Yet he takes this course with a realization that war often, if not generally in these modern times, has been nothing more than a selfish struggle for material advantage for the benefit of a small circle among the contending nations. On page 306 he refers correctly to colonial expansion and markets as the concern of "only a small part of the citizen body of the particular state," although the chief objective of foreign offices. These things mean war, but what have they to do with real "self-help" or "redress of grievances" so far as the great body of the nation is concerned, or with "law" or "legality"? Are we to call the *practices* of nations when they revert to the ways of the jungle by the resounding name of *law?* Must we ever tap Mars gently on the wrist and ask him to moderate—not suppress—his rages?

What is the purpose of law? Within the state among its greatest purposes are the securing of peace and equality of advantage to all citizens. This fact, so clear to us within the nation, is practically never made a touchstone when law is defined internationally with relation to the objects of its supposed service. Instead of following somewhat blindly elder definitions of international law, had we not better say that the purpose of true international law is at the present time to secure peace between states as nations have endeavored to maintain it at home, and then add that, in so far as war exists between nations at all, it demonstrates the failure of international law? Until this position is recognized, we may expect, as is the fact, treatises said to be upon international law to be little more than compendiums of facts bearing little relation to law of any fundamental importance. Such works, when valuable today, are scarcely more than guides to the art of politeness and ways of ordinary business among nations—useful, but only in a minor way enlightening, and without the breath of sentient life. They may not

inspire enthusiasm. No work that palliates or justifies war can in deep earnestness and in this particular be called a work on international law, if the purpose of such law is to preserve peace among nations. Authors can not go far till they address themselves to this deeper question of international well-being. It may be that in taking the newer position just outlined they will be right in discarding the old ideas of natural law and of any active Providential interference in particular events at any rate. But we cannot disregard the principle of utilitarianism. We must learn from the consequences of acts the fundamental principle of right and wrong—that is to say, law—among nations. The mass psychology of peoples has to be studied for its bearings and rules affecting our problem. Unfortunately, all these things are steadily ignored for the innutritious rehearsal of events, the substantial reasons behind the events being rarely traced out, but the pretenses advanced usually accepted.

However, we must take books as we find them and for what they are, even though the authors seem in our opinion to have missed their larger opportunities.

This work has been most carefully done, and will fill the place designed with both teacher and student, as well as with the general reader. Let us hope, however, that on a future occasion Prof. Fenwick will devote his knowledge of materials to a wider and, if you please, a more idealistic—which would at the same time be a more really practical—treatment of the subject, leaving behind the traditions of the past.

JACKSON H. RALSTON.

Memoirs of My Life. By Giovanni Giolitti. Translated by Edward Storer and prefaced by a study of the personality and career of Giolitti by O. Malagodi. London: Chapman and Dodd, Ltd., 1923. pp. ix, 472. 30 shillings.

Signor Giolitti's career and achievements as a public official have given him a unique place among the great statesmen of modern times. And his *Memoirs,* touching intimately as they do on so many vital developments not only in the national life of Italy, but also in the international affairs of Europe, form one of the most important contributions on the political and diplomatic history of recent times. No one who wishes to understand the fundamental principles of successful national administration, or how to conceive and execute a broad-minded foreign policy, can afford to miss this volume. And an intimate acquaintance with its pages is essential to a clear understanding of the recent political and social development of Italy, and of such international episodes as the Libyan War, the Trieste and Fiume disputes and the Austro-Italian controversies over Balkan problems.

The Giolitti *Memoirs* cover the long period from his birth in 1842 and his youthful days at San Damiano in the Val di Macra, a valley of the Eastern

or Maritime Alps, down to end of his fifth ministry in 1921. The first three chapters are concerned with a short account of his education and his political novitiate in the Ministries of Justice and Finance, as Deputy, and as Minister of the Treasury under Crispi. The next three chapters are devoted to a detailed account of his first premiership, the internal political squabbles and developments from 1892 to 1898, the Banco Romano and the "Plico Segreto" scandals, the unfortunate dictatorial régime of Crispi, and the Abyssinian War. Four chapters then follow, describing at length how a liberal government was evolved during his two ministries that covered most of the period from 1903 to 1908, the finances of the state reorganized, economic conditions greatly improved, and many remarkable reforms put through—such as universal suffrage, reorganization of taxes and conversion of the public debt, and nationalization of the railways.

Chapters XI to XIV deal intimately with the Libyan War from its inception in his own brain to the conclusion of peace with Turkey, including a detailed account of the prolonged negotiations at Lausanne and Caux which preceded the eight days' ultimatum to the Porte and the end of the conflict. Chapter XV is a most interesting and illuminating portrayal, with documentary material, of the secret "conversations" between Austria and Italy concerning Balkan problems and the story of how Austria tried deliberately on two occasions to draw or force Italy into military aggression over Serbian and Albanian difficulties. The ensuing chapter, entitled "Italy's Neutrality and Her Entry into the War," is an explanation of Giolitti's "neutrality policy" for Italy, which he advocated consistently and with sincerity in 1914, because of his convictions concerning the long duration of the conflict then starting, and the difficulties and sacrifices that Italy would be called upon to face if she entered the war. Yet there is little of value for the historian in this chapter, since Signor Giolitti was not in office during the period of the war, or even in intimate touch with the government or the conduct of diplomatic affairs.

The last two chapters contain a summary of the deplorable situation—internal and international—in which Italy found herself at the close of the war, of his adjustment of the Fiume dispute and the Vallona or Albanian problem in his fifth ministry, and of his reform plan to adjust the internal troubles that had caused an industrial, financial and social crisis. Opposition to his measures unfortunately developed rapidly in the Chamber of Deputies; and he resigned promptly, realizing the futility of attempting drastic reforms without the genuine support of a large parliamentary majority. Yet the reorganization which he contemplated was ultimately achieved, amid the plaudits of all Italy and of the world, by another of Italy's illustrious sons: Mussolini.

Signor Giolitti writes in a straight-forward pungent style, without rhetorical flourishes. He indulges in no diatribes against the persons or policies of his opponents or political contemporaries. He is not a champion

of any cause—political, economic, social or moral. Nor does he set forth claims to political genius or brilliancy. He tells his story simply, yet with a sincerity and earnestness that bears conviction; while his narrative is genuine and true to the facts as Giolitti knows them, or as the documents in his possession bear witness. His judgment of men is so excellent, and his characterization of the leading personalities of his time so accurate, that one regrets to find so small a portion of this work devoted to the social and personal side of his public life.

It is, indeed, refreshing to find a book of reminiscences dealing trenchantly with men and affairs through a period of fifty years, so free from personal bias and egotism. And there is no other single volume that demonstrates so clearly and so strikingly, yet without pride, how easy it is for one who serves his country intelligently and unselfishly with a determination to safeguard the national interests and to promote the welfare and happiness of the people at all costs, to rise to great heights in the field of political activity. The great interest that dictated the policy of Giolitti throughout his long political career was "country"; and, if ever a column is raised to those statesmen who served their country with superlative unselfishness and singleness of purpose, it will bear the names of Lincoln, Harding and Giolitti.

In the field of international politics, Giolitti has set an example which the diplomats of all nations will do well to emulate. No better principles were ever conceived as the basis for a foreign policy than those he laid down for Italy. These were: that her policy should be essentially pacific, and that it should preserve good relations with her neighbors. In his mind, to avoid a general war was more important than punishing a recalcitrant small state, or resorting to military demonstrations to secure a legitimate solution of international difficulties or problems. In the course of the Montenegro episode of 1913, he wired San Guiliano, Italian Minister of Foreign Affairs, that "the folly and crimes of a little State destined to disappear were far less serious than the danger of provoking an European war through our anxiety to bring it to reason as quickly as possible."

In the complete frankness and simplicity of the means used in the pursuit of his ends, Giolitti demonstrated that intrigue, deception and artifice are no longer, if they ever were, essential to the successful conduct of foreign relations. By keeping the great Powers posted systematically on the disturbing conditions in Tripolitania, and frankly conveying to them Italy's apprehensions and policy, Giolitti paved the way for the successful occupation of Libya by Italy without endangering the peace of Europe. And, in European circles, he showed how it was possible to utilize alliances to ensure international protection and peace and to secure commercial advantages, without resorting in the least to aggression. The Triple Alliance, as he defined it, was a "defensive alliance, which, while it guaranteed us our security, allowed us at the same time to enter into cordial relations with

other powers on a footing of perfect equality." And he insisted that the policy of Italy should conform to this interpretation.

And, finally, Giolitti denounces the folly of undertaking colonial adventures or military expeditions, such as the Abyssinian campaign, "as a means of diverting public opinion." Indeed, it is perfectly clear that no colonial enterprise or far-reaching foreign policy should ever be attempted which is not supported whole-heartedly by both parliament and public opinion, and which is not financially well within the means of the state that plans it. And great care should be taken not only to insure its successful execution without conflict, but also to see to it that the scheme contemplated does not injure materially the rights or interests of other states, or disrupt the good relations existing between countries.

NORMAN DWIGHT HARRIS.

International Law and some Current Illusions and other Essays. By John Bassett Moore. New York: The Macmillan Co., 1924. pp. xviii, 381. $4.00.

In this volume, or at least in the first essay from which it derives its title, John Bassett Moore endeavors, very successfully it is believed, "to contribute something towards the restoration of that sanity of thinking and legal and historical perspective which the recent so-called World War has so seriously disturbed." In carrying this object into execution, Judge Moore has rendered a service which cannot be overestimated. It cannot be doubted that the still, small voice of reason, resuscitated again under such authoritative auspices, will be heard throughout the world and particularly in the United States, and will shatter many of the illusions and misconceptions which were created during or have followed in the wake of the recent catastrophe.

The other eight essays in the book, to be described more fully hereafter, consist for the most part of papers on different subjects connected with international law, jurisprudence, or public policy, published or read at various places or occasions. In bringing them together here in book form, Judge Moore has placed the student and man of affairs in his debt. The essays are not merely informational or entertaining; in every department of knowledge which they touch, they disclose the master's sure grasp of fundamentals, nurtured in history and a sound, benign philosophy, expressed with serenity, wit and an elevation of style and diction, which may well serve as a model of the finest type of historical and legal writing. If the essays may be characterized as a group, they may be said to be featured by an invocation to the necessity of thinking in terms of fundamental and elementary conceptions, with a comparative perspective. Thus, the simplicity of the thesis, combined with the author's vast experience and a natural gift for clear exposition, make these essays at once most readable

and provocative of thought and therefore highly educational. They are not merely technical discussions for the lawyer and the student of international law, though there is not a professional reader who will not profit from them; but they are literary productions which the intelligent layman and man of affairs will not fail to appreciate.

In the first essay, Judge Moore challenges those publicists who seem to have adopted the view "that the international law of the future is to be found in the infringement of its rules committed under the stress of war." Judge Moore, like Grotius in his time, raises his voice in behalf of law, as it has developed among nations through the centuries, and warns against a mistaken estimation of the legal importance of those violations which mark the heat of conflict. He attacks particularly the recently purveyed conception that the fundamental distinction between combatants and non-combatants has ceased to have validity, and that the tiller of the soil and the producer of foodstuffs is now to be considered a combatant. He deprecates the subversive view that the time-honored distinction between enemy private and public property is no longer regarded as fundamental as formerly and that private property may be confiscated or used for the discharge of a public indebtedness or as a measure of reprisal against public national offenses—a notion which seems to have made a deep and correspondingly ruinous impression upon the minds of those who, in their desire to outlaw war by proclamation and indict and punish the elusive "aggressor," would authorize the confiscation of the private property of citizens of the politically declared pariah, thereby promoting, it is believed, the frequency and devastation of war and the insecurity of the institution of private property, with further demoralization of international law. By the citation of statistics of prior wars, Judge Moore shows that the recent war, however impossible of exaggeration, was neither more widespread nor more destructive, relatively speaking, than a number of earlier wars, *e.g.*, the Thirty Years' War and the wars growing out of the French Revolution and the Napoleonic Wars, and that hence there is little ground for canonizing the violations of international law during the recent war as the mark of an epochal break with the past or with the reasons justifying the rules of law in their historical growth. In this connection, Judge Moore particularly challenges the suggestion that the reason for the distinction between goods absolutely and conditionally contraband has ceased to exist. He points out that the "exceptional" measures adopted by the British Government in 1793 to classify foodstuffs as contraband, closely resembled those of 1915 and 1916 and that the earlier, as Jefferson irrefutably demonstrated, were as illegal as the latter, which indeed were not proclaimed by their designers as lawful, but were sought to be justified as "exceptional." In the course of the discussion, the author points out that the rules of contraband and blockade have not grown out of logic, conferring upon a belligerent the privilege of seizing anything which may be of military use or of importance to his enemy, but are the result of

compromise between two conflicting and irreconcilable claims—that of the belligerent to stop all commerce with his enemy, and that of the neutral to continue freely to trade with the belligerents. Judge Moore's treatment of the fundamental bases and the history underlying the rules of law in this regard, should dissipate many illusions which some commentators upon the recent war have tended to promote.

The second essay on "Contraband of War," a paper read before the American Philosophical Society in 1912, points out certain fundamental conceptions of the institution in question, perhaps the most important of the laws of war. The author shows that the carriage of contraband, punishable by confiscation, cannot be lawful, as is sometimes asserted in a confusion of international and municipal law. The discussion in 1912 of the conflict of interest between belligerent and neutral in the matter of contraband and of the problems to which the somewhat sterile provisions of the Declaration of London in this regard would give rise, shows a prophetic vision. The necessity of definitely limiting the premissible category of contraband, Judge Moore deemed indispensable, otherwise, as events proved, the neutral safeguards that "free ships make free goods," contraband excepted, and that blockades must be effectively maintained, become a snare and a delusion. The history of the belligerent claim that foodstuffs may be declared contraband is examined in a section which affords a useful background for the discussion in the first essay as to the importance of maintaining the age-old category of goods conditionally contraband. Sooner than abandon the classical distinction between absolute and conditional contraband, by making both absolute, it is more likely that the classification of "contraband" itself will be abandoned, as the British Government indeed proposed at the Hague Conference of 1907, with only five countries, including the United States, voting against it. In 1912, Judge Moore suggested, in view of the very unsatisfactory legal position, the advisability of adding to neutral duties the obligation of prohibiting the exportation of arms and munitions, as Brazil and Denmark had done during the Spanish-American War. Judge Moore's strong insistence upon maintaining the American tradition in preserving the rights of neutrals as the greatest good to mankind, must command general approval.

In the third essay, on "International Arbitration," delivered as an address in the spring of 1914 as presiding officer of the Lake Mohonk Conference, Judge Moore, in a survey of existing conditions, remarked upon the deterioration, since 1895, of the institution of arbitration, particularly on the part of the United States, and called prophetic attention to the dangers to peace involved in the European political situation. In the exercise by the Senate of ever greater limitation and control over the process of submitting questions to arbitration, the author saw a step backward. He traces the history of arbitration and pays tribute to the work in this regard of the first and second Hague Conferences. He does not think highly of the

arbitration treaties of the twentieth century which proposed to make arbitration obligatory, with the exception of questions of honor and vital interest, thus depriving the agreement of all practical importance. Judge Moore expresses here the opinion that "perhaps it may be unreasonable to expect that international wars will cease before civil wars end" and "in the one case as in the other the maintainance of continuously peaceful conditions will depend upon the general improvement of political and social relations."

The fourth essay, on "the Permanent Court of International Justice," embodies a historical presentation of the antecedents of the present court, of which the author is a distinguished member, and a description of its personnel, its jurisdiction, its practice and procedure, and the judgments and advisory opinions it has rendered. Fortunately for the life of the court, Lord Finlay and Judge Moore successfully opposed the proposal of certain members of the court to give confidential and unpublished opinions to the Council. The documents appended make the essay one of the best and most authoritative accounts of the work and history of the court.

The fifth essay on the "Rules of Warfare: Aircraft and Radio" contains an account of the international conference of the Commission of Jurists held at The Hague in December, 1922, over which Judge Moore presided, "for the purpose of formulating a code of rules for the regulation of the use of aircraft and radio in time of war," an outgrowth of the Washington Conference on the Limitation of Armament. The proceedings and conclusions of the conference are described, followed by the General Report, not heretofore published in the United States. The Rules and General Report are among the ablest documents of their kind of which the reviewer is aware, for they apparently avoid those ambiguities which often conceal or disguise the inability to reach any agreement and are therefore distinctly harmful. The crucial share of Judge Moore himself, as chairman of the conference, in bringing its trying labors to success, has been attested by Admiral Rodgers, American Naval Adviser at the Conference. The convention now awaits approval at the hands of the participating governments.

The sixth essay, "Law and Organization," a presidential address delivered before the American Political Science Association in 1914, presents a critical comparison of municipal and international law. The author deprecates the futile polemics on the question whether international law is law, because the respective protagonists differ as to their conception of law and its application. He points out that international law differs from municipal law not in its essence or obligation, but in the method of its declaration and administration. The principal defect in the international sphere he finds to reside in the lack of that organization which gives to the administration of law within the state a certain security. But recent events have shown that even a highly integrated organization like the League of Nations cannot produce peace when the prevailing political and social conditions, whether dictated

by treaty or otherwise, leave in the minds of nations a rankling sense of injustice or insecurity. It certainly cannot produce peace when by intention or otherwise some of the nations of the world are excluded from the organization. In a valuable postscript to this chapter, written in 1924, Judge Moore acutely psychoanalyses—if that expression may be pardoned—the pacific adherents of such slogans as "the war to end war," which of all illusions he calls the vainest, and of "peace through victory," which would doubtless satisfy the most ardent militarist. Judge Moore has little faith in the notion that preponderant force, though it may end a war, can be relied upon to insure peace. He is skeptical about the use to which "sanctions" would be put, if their devotees had them. Judge Moore presents in their true relations, the assumed antonyms, the balance of power, which tends to crystallize from among all associations of nations, and the concert of nations. The former, which is not distinguishable from a planned preponderance of power, he characterizes as the natural and instinctive, the latter as the artificial. Judge Moore also pricks the illusion that it is always possible to find out who began or is responsible for the outbreak of a conflict.

In the seventh essay, entitled the "Passion for Uniformity," the author shows the devastation, moral and physical, wrought throughout history by the futile conception that men can or should by force be made to think and act alike. As an appeal for the moral and practical wisdom of tolerance, few more forceful contributions have been made. In this chapter are discussed such subjects as codification, the defects in the legal system of the United States and similar topics, all of which had a marked effect in initiating the reform movement now exemplified by the American Law Institute.

In the eighth essay, "Suggestions for a School of Jurisprudence," Judge Moore publishes his "Plan" of 1915, then privately printed, for the establishment of courses and the active prosecution of research in "comparative law" and jurisprudence, as a direct means for carrying into effect the proposals for law reform discussed in the previous essay. The fact that his recommendations are gradually receiving approval and acceptance by several of our leading law schools attests Judge Moore's influence as an educator.

The last essay, entitled "Relativity," an address recently delivered, represents in a sense a consummation and synthesis of the author's thesis and philosophy, namely, "that all things are relative and that they are to be considered not as isolated facts but in relation to other facts, past and present." Were men generally guided by this precept, it would not be so easy to sweep them off their feet by sudden events and biased accounts thereof, appropriately pictured and framed for their delectation and stimulation by those having a purpose in so doing. In the loss of that sense of perspective and proportion which is so necessary to the reasoned consideration of facts, lies a universal danger of mental and moral deterioration. The author draws upon a world of experience to illustrate the conservative and practical importance of his injunction.

One cannot put this volume down without a realization of communion with one of the most trenchant and powerful minds of the day. The versatility, yet profundity, which mark its pages, exemplify the busy and highly useful life and thinking of the scholar, the statesman, the lawyer, the historian, the philosopher, the educator, the humanitarian. Read comprehendingly, it will exert a wide and sound influence and cannot fail to achieve the author's object of helping to restore sanity of thinking and a legal and historical perspective to a shell-shocked world. In the field of international law, this book will take its place as one of the great fundamental and indispensable works.

EDWIN M. BORCHARD.

Traité pratique de Droit international privé. Vol. I. By Antoine Pillet. Paris: Librairie Sirey, 1923. pp. viii, 789. 50 francs.

The book before us is only the first volume of what promises to be a most extensive and comprehensive treatise upon the practical problems of private international law. Professor Pillet's earlier work, published more than twenty years ago, entitled *Principes du droit international privé,* is well known to most students in this field. It dealt mainly with theoretical concepts and with the advantages of a new classification which the author proposed in an attempt to simplify the problems and to bring legal principles closer to the facts of international life. In the present work he presents the jurisprudence of France in systematic form, illustrating as far as possible his earlier ideas by presenting their progressive development in the French decided cases, and by pointing out where the courts have failed to comprehend what the author deems the true principle.

The author follows his threefold division of the subject-matter into (1) the rights of aliens; (2) the conflict of laws; (3) the effect to be given internationally to acquired rights (pp. 5–12). With regard to the first two divisions we are on familiar ground, but with regard to the third, the examples which the author gives are not always convincing. Thus the question as to whether an alien married woman enjoys a lien by operation of law upon the French property of her husband is decided in the negative by French courts on the theory that this is a civil right accorded only to *French* married women. The author would ask only whether the law governing the marriage of the parties vested in her the right of lien. But this is a conflict of laws like others which arise from the creation of rights which cannot be completely enforced in the state where they were created. Whether a right acquired in one state shall be recognized in another involves the *question préalable* as to which shall be the governing law. We think, therefore, that while the classification may be usefully employed as embracing a certain group of conflicts, it fails as a test by which conflicts may be solved.

In the historical introduction the author also contrasts the principles

prevailing in France with those of other countries. He is inclined to believe that the Anglo-American tendency to apply territorial or local rules springs from our respect for ancient authority; that our laws in this field are far behind the times; and that only the intelligence of our judges makes them workable (p. 95). Yet he admits the results reached are often quite favorable to international life. If the guardian appointed abroad at the place of nationality or domicile has no rights as such in our courts over local property, at least the judge will usually consent, in a separate proceeding, to appoint the same person guardian who has been designated abroad (p. 96).

Nationality plays a rôle so important as a determinant of private rights under European systems that we are not surprised to observe that more than one hundred pages of the book are devoted to the complicated problems of the acquisition and loss of French nationality (pp. 177–284). Some of the modern complications growing out of separate nationality of married women are here discussed and the wise French rule is emphasized, lacking for example in England, by which a French woman who marries a foreigner does not lose her national status unless she thereby acquires a new nationality (p. 210).

The French rule of jurisdiction permitting French nationals to bring actions in France is dealt with at considerable length. The author is quite frank about the purpose of this old rule of the Napoleonic codes, with the correlative rule developed by judicial interpretation, that suits against nationals must be brought in France. Both rules he admits to be the result of conscious discrimination against foreigners (pp. 354–355). As such they are clearly a burden on international trade and, as the author indicates, even a possible cause of international complications (p. 355). It is too much to expect in this era, so similar in many respects to the period from which they trace their origin, that any amelioration will be found. We have here an excellent example of the influence of nationalism on private legal rights. These and others of like kind, found in other countries as well as France, though seldom taken into account in the chancelleries of diplomacy, nevertheless add legal to the political and economic barriers causing irritation in international intercourse. France has entered into treaties abolishing these discriminations with her friendly neighbors Belgium and Switzerland, and, to a more limited extent, with Spain. These treaties are analyzed by the author (pp. 431–485). They are held not to apply to the advantage of citizens of the United States under the most-favored-nation clause (p. 441).

The present volume deals also with conflicts in the status of persons, in family relations and, in an uncompleted portion, with conflicts in property rights. The author discusses the Hague conventions relating to marriage, divorce and guardianship. These, though denounced by France shortly prior to war, are still in effect between certain of the other signatories (p. 688).

The author tells us in the preface that this volume and the one to come represent the labors of twenty years of his life. There are not many pro-

ductive periods of this length in the life of any man. Professor Pillet's treatise will merit the highest standing as the matured judgment of a recognized authority who never for one moment loses his pragmatic view-point in an endeavor to conform his doctrines to the demands of international life.

ARTHUR K. KUHN.

Nociones de Derecho Internacional. By Miguel Cruchaga Tocornal. 3d ed. Vol. 1. Madrid: Editorial Reus (S. A.) Cañizares. pp. 648.

It is generally assumed by many in this country that Latin-American literature on the subject of international law is either non-existent or valueless or unimportant. As a matter of fact, it would not be very difficult to write out a long list of Latin-American publicists who have unquestionably enriched with valuable contributions the universal literature of international law, not only in a general way, covering the entire field of international law as a science and as a set of rules controlling the conduct of states in their international relations, but also on special topics which, while of peculiar interest to Latin Americans, are also of great interest to the world at large. Among the Latin-American publicists who have written on international law generally there may be mentioned, for instance, Don Andrés Bello, a Venezuelan by birth, and a Chilean by adoption, whose *Principios de Derecho Internacional*, originally published in 1832, has become a classic in Latin-American literature on international law. This may be followed by De Pando, a Peruvian, whose *Elementos de Derecho Internacional*, originally published in 1852 as a posthumous production, has been the subject of much criticism and, perhaps, undeserved ridicule, owing to the author's incorporation in his book, almost word for word, of a substantial part of Bello's treatise, apparently without giving him due credit for the quotations. There is also Matta Albuquerque, a Brazilian, whose *Elemento de Dereito das Gentes*, published in 1851, is still cited as an authority, and Gomar, a Uruguayan, well known in Latin America for his *Curso Elemental de Derecho de Gentes*, originally published in 1864; Aspiazu, a Bolivian, whose *Dogmas de Derecho Internacional*, published in 1872, is also considered as an authority in all Latin America; Madiedo, a Colombian, whose *Tratado de Derecho de Gentes, Internacional, Diplomático, y Consular* is very often cited in Latin America: Seijas, a Venezuelan, whose posthumous and unfinished work, entitled *El Derecho Internacional Hispano-Americano, Público y Privado*, published in 1884 on a plan similar to that in Moore's *Digest of International Law*, contains an important collection of diplomatic documents and precedents, very valuable to foreign chanceries in Latin America. There is also Calvo, an Argentinian, whose work on international law, written in French, has become one of the modern classics of international law throughout the civilized world; Alcorta, also an Argentinian, who has left us in the first volume of his *Tratado de Derecho Internacional*, published in 1887, a most interesting introduction to the study

of that science; Diez de Medina, a Bolivian, whose *Nociones de Derecho Internacional*, originally published in the last quarter of the last century, is still considered as an important authority in Latin America. So Tejada, a Guatemalan, who wrote in 1894, his *Derecho Internacional;* so also Pinto Rivadavia y Leguizamon, an Argentinian, whose *Derecho Internacional* was published in 1894; and so also Rodríguez Saráchaga, an Argentinian, whose *El Derecho Internacional Público* was published in 1900. I may also cite Ribeyro, a Peruvian, whose *Derecho Internacional Público*, published in 1901, has reached several editions and become quite an important authority on the subject; Flores, a Guatemalan, whose *Derecho Internacional*, was published in 1902; Bidau, an Argentinian, whose *Apuntes de Derecho Internacional Público* was published in 1906; Fernández Frida, a Chilean, *Estudios de Derecho Internacional Público y Privado*, 1902; Acosta, a Venezuelan, *Estudios de Derecho Internacional*, 1908; Sa Vianna, a Brazilian, *Elemento de Direito Internacional*, 1908; Bevilaqua, a Brazilian, *Direito Publico Internacional*, 1911; Zeballos y Weis, *Derecho Internacional*, 1911. Mention may be made also of Planas Suárez, whose *Tratado de Derecho Internacional Público*, published in two volumes in 1916, is rapidly becoming an authority on the general subject of international law; and Cruchaga Tocornal, whose *Nociones de Derecho Internacional*, now under review, has already attained the reputation of an authentic authority throughout the Latin-American countries.

Latin-American literature on international law is especially rich on topics of peculiar interest to Latin America, but space will not permit even a partial list of such works.

The volume under review is published by the well-known Editorial Reus Company of Madrid as Volume XLVII of the *Biblioteca Jurídica de Autores Españoles y Extranjeros* (Juridical Library of Spanish and Foreign Authors). It is, as above indicated, the first volume of the third edition of Cruchaga Tocornal's well-known treatise on international law, brought, so to speak, up to date. "In this third edition of the *Nociones de Derecho Internacional*," says the author, "I discuss the most important diplomatic happenings of the last few years, and present more extensive information in respect to matters of an international political character, in which the American countries have so far taken any part or especial interest." The purpose of this book is, as the author suggests, to make a survey of international law as it stands today. The work is intended as a text-book for the teaching of international law, and, for this reason, the author has endeavored to present a methodical exposition of his subject, with as great accuracy and precision as possible. The method followed is, indeed, the historical one, as being the most useful and adaptable to students.

In connection with the topic of intervention, the author has dedicated to a discussion of the Monroe Doctrine a whole chapter of over twenty pages, which is really deserving of more than passing notice. There is also a rather interesting chapter on the well-known Drago Doctrine, which culminated in

the so-called Porter resolution of the Second Peace Conference at The Hague. The chapters on the League of Nations are also very interesting. There is also a final chapter on the Permanent Court of International Justice.

It is really a pity that books like the one under review are not translated into English so that Latin-American writers might become better known by American readers.

PEDRO CAPÓ-RODRÍGUEZ.

BOOK NOTES

Approaches to World Problems. New Haven: Yale University Press. 1924. pp. 126. $1.50.

This is another number in the series of publications of the Institute of Politics of Williams College at Williamstown, Massachusetts. It contains three addresses, one by the Earl of Birkenhead, entitled "Problems Left by the Great War," one by General Tasker H. Bliss, entitled "World Relations in their Bearing on International Peace and War," and the third by Philip Henry Kerr, divided into two parts, the first treating of "World Problems of Today," and the second, "World Law and World Peace." A foreword by the Institute of Politics states that these addresses illustrate three different methods of approach to the fundamental question of peace.

The Inter-Ally Debts: An Analysis of War and Post-War Public Finance, 1914–1923. By Harvey E. Fisk. New York–Paris: Bankers Trust Company. 1924. pp. 367.

This book, the Bankers Trust Company states, was published in response to many inquiries regarding the cost of the World War, how the money to meet it was raised and spent, and more particularly as a carefully compiled record of the debts between the Allies. The statistics are based on official data, and the publishers state that they have spared no effort to make the book authoritative.

International Law Decisions and Notes, 1922. Washington: Government Printing Office. 1924. pp. v, 212. 60 cents.

The discussions on international law at the Naval War College, conducted by Professor George Grafton Wilson, were devoted in the year 1922 to the subject of the decisions of the prize courts of the leading belligerents during the World War, and the present volume contains illustrative decisions selected mainly from the courts of Germany, France and Great Britain.

The International Law Association. Report of the Thirty-Second Conference held at the Old Hall, Lincoln's Inn, London, October 4, 1923. London: Sweet & Maxwell. 1924. pp. lxii, 51. 12*s.* 6*d.*

Owing to the sudden death of Dr. Zeballos, the President of the Conference, on the day it opened, the proceedings were brought to an abrupt and

untimely end. They were limited to the reading of a paper by Dr. Ernest J. Schuster on the subject of "The Effect of Marriage on Nationality," and a discussion of the paper by members present. At the conclusion of the discussion, Miss Chrystal MacMillan laid before the Conference a proposal of the International Woman Suffrage Alliance at its conference in Rome of a draft International Convention on the Nationality of Married Women, and the provisional draft is printed as an appendix to the report. The Right Honorable Lord Phillimore presided during the illness of Dr. Zeballos, and when the latter's death was announced, the dinner of the Society was cancelled and further proceedings were adjourned. The first sixty-two pages contain information regarding the Association, including its constitution, members, officers and committees, and branches.

Les Origines et l'Oeuvre de la Société des Nations. Tome I. Published by Rask-Orstedfonden under the direction of P. Munch. Copenhagen: Gyldendalske Boghandel-Nordisk Forlag. 1923. pp. 608.

The Rask-Orstedfonden is a fund instituted by the Danish Parliament in 1919 for the purpose of aiding in the development of Danish science in co-operation with international scientific studies. In 1921, the administrative committee decided to publish a scientific work on the League of Nations, with the collaboration of authors of different countries, and the present volume is the result of that decision. It is composed of a series of articles on the League of Nations by sixteen authors of various nationalities, including Norway, France, Germany, Denmark, Great Britain, the United States, the Netherlands, China, Sweden and Belgium. The covenant of the League of Nations is printed in the appendix. The article for the United States was written by Mr. Norman H. Davis, and is entitled "The Past and Probable Future Attitude of the United States."

Règlement de Procédure civile de la République de Chine. Pekin: La Commission de l'Exterritorialité. March, 1924. pp. xxi, 259. $2.50.

Législation commerciale de la République de Chine. Pekin: La Commission de l'Exterritorialité. February, 1924. pp. xix, 213. $2.50.

In our issue for April, 1924 (page 393), we gave an account of the work of the Commission on Extraterritoriality charged by the Chinese Government with the preparation of material for the eventual use of the international commission proposed by a resolution of the Conference at Washington on December 10, 1921, to inquire into the subject of the relinquishment of extraterritoriality in China. The present pamphlets are two more numbers in the series now being published by the Commission on Extraterritoriality. They are on sale by *La Librairie Française*, Pekin.

The British Year Book of International Law, 1924. London: Humphrey Milford. pp. vi, 268.

The fifth issue of this Year Book maintains the excellent standard of its predecessors. It contains ten leading papers, a number of interesting notes, judicial decisions, book reviews, a bibliography, and a summary of events during the year ended April 30, 1924. The leading paper is by Professor J. L. Brierly on the subject of "The Shortcomings of International Law." Other papers of especial interest to Americans are "The Codification of International Law," by Professor P. J. Baker, and "The Monroe Doctrine," by Professor A. Pearce Higgins. Among the notes, especial attention may be called to one on "The Applicability of the United States Prohibition Law to Foreign Ships Entering American Ports," and to another on "The Liquor Treaty between the British Empire and the United States of America." In the section of the volume relating to Judicial Decisions, Professor James W. Garner contributes a note on "The Decisions of the German-American Mixed Claims Commission."

Other leading papers are "The Legality of the Occupation of the Ruhr," by A. D. McNair; "The *Trent* and the *China*," by H. W. Malkin; "The Soviet Government and Russian Property in Foreign Countries," by Norman Bentwich; "The Free City of Danzig," by Malcolm M. Lewis; "What is the League of Nations," by P. E. Corbett; "The Grounds of Intervention in International Law," by P. H. Winfield; and "State Succession in Matters of Tort," by Sir Cecil J. B. Hurst.

Jurisprudence Française en Matière de Prises Maritimes. Paris: A. Pedone. Part I, 1916, pp. 272, 10 fr.; Part II, 1919, pp. 273–496, lxiv.

Jurisprudence Britannique en Matière de Prises Maritimes. Paris: Rousseau & Co. Part I, 1918, pp. 198, lxxx, 15 fr.; Part II, 1922, pp. 199–457, lxxxi–cxv. 22 fr. 50.

Jurisprudence Italienne en Matière de Prises Maritimes. Paris: Rousseau & Co. Part I, 1918, pp. lxiv, 224, 15 fr.; Part II, 1921, pp. lxv–lxxix, 225–523. 22 fr. 50.

Jurisprudence Allemande en Matière de Prises Maritimes. Paris: Rousseau & Co. Part I, 1922, pp. 197, 25 fr.; Part II, 1924, pp. 193–329, xxxiv. 25 fr.

In 1916, M. Paul Fauchille undertook the publication in French of the prize decisions rendered during the World War by the high courts in France, Great Britain, Italy and Germany. The decisions have been translated into French and published in parts as above listed.

Accompanying the texts of the decisions, there are printed the texts of official documents relating to the subject of prize issued in the respective countries during the war. These texts have Roman pagination. In the preparation of the British and Italian cases, M. Jules Basdevant appears as co-editor with M. Fauchille, and in the preparation of the German decisions, M. Charles de Visscher appears in that capacity.

La Cuarta Asamblea de la Liga de las Naciones. By Cosme de la Torriente, President of the Cuban Delegation and President of the Assembly. Havana: Rambla, Bouza & Co., 1924. pp. 175.

This volume gives a full account of the work of the Fourth Assembly of the League of Nations, over which Señor de la Torriente was elected to preside. The organization of the Assembly and of its committees is shown, with details of the sessions held by each committee and of the numerous subjects dealt with by them. The work of the Assembly itself is completely reported and a summary of each session is given. The text of all resolutions, decisions and recommendations is printed in full. There is also included Señor de la Torriente's address as President of the Assembly at the close of the sessions, September 29, 1923, and the speeches made at the banquet given in his honor by the *Comité France-Amérique* at Paris on the 25th of October, at which M. Raymond Poincaré presided.

The present volume is the third which Señor de la Torriente has written on the League of Nations. His first work dealt with the Second Assembly, and was entitled *La Liga de las Naciones—Trabajos de la Segunda Asamblea* (Havana, 1922, 259 pages), and last year he published at Havana a volume of over 500 pages on the activities of the League of Nations (*Actividades de la Liga de las Naciones*).

Arbitration Treaties among the American Nations to the Close of the Year 1910. Edited by William R. Manning. New York: Oxford University Press, American Branch. 1924. pp. xl, 472. $3.50.

This compilation, issued by the Carnegie Endowment for International Peace, is designed to include not only all arbitration treaties, but also all arbitral clauses of other treaties which were signed between or among American nations before the close of 1910 and duly ratified. The texts are in the English language. The 228 treaty engagements to arbitrate here set out afford a useful compendium of the effective activity of the principle of arbitration in the New World. Detailed alphabetical and chronological tables make the contents of the volume readily found.

German White Book concerning the Responsibility of the Authors of the War. Translated by the Carnegie Endowment for International Peace, Division of International Law. New York: Oxford University Press, American Branch. 1924. pp. xv, 178. $2.00.

This volume consists mainly of the document entitled *German Observations on the Report of the Commission of the Allied and Associated Governments in the Responsibility of the Authors of the War,* which was prepared by a group of German scholars and publicists and transmitted by Count Brockdorff-Rantzau, May 28, 1919, to M. Clemenceau as President of the Peace Conference. The Endowment has added a serviceable list of official positions of the principal persons mentioned in the documents, and an index.

Preliminary History of the Armistice: Official Documents published by the German National Chancellery by Order of the Ministry of State. Translated by the Carnegie Endowment for International Peace, Division of International Law. New York: Oxford University Press, American Branch. 1924. pp. xii, 163. $2.00.

This is also a German White Book, issued by the Republican Government of Germany in 1919, consisting of official German documents giving the various reasons which caused Germany to request an armistice from the Principal Allied and Associated Powers. The documents, which were taken from the archives of the German Foreign Office and from the Imperial Chancellery, cover the period between August 14 and November 11, 1918, and consist of the conferences and the deliberations that took place between the German Government and the Supreme Army Command after the latter had come to the conclusion, owing to the military reverses of July and August 1918, that German victory was no longer possible.

The JOURNAL has received from the publishers, Rousseau & Company, Paris, a brochure in French of 66 pages entitled *Le nouveau droit international public et sa codification en Amérique*, by Alejandro Alvarez. It is a detailed syllabus of the contents of a work under that title in two volumes which Dr. Alvarez intends to bring out and present to the meeting of the American jurists in Rio de Janeiro in 1925 for the purpose of codifying international law. Dr. Alvarez was a delegate of Chile to the Fourth and Fifth Panamerican Conferences, and of Ecuador to the meeting of American jurists in 1912 for the codification of international law.

La Codificación del Derecho Internacional en América, Trabajos de la Tercera Comisión de la Asamblea de Jurisconsultos reunida en Santiago de Chile. By Alejandro Alvarez. Santiago de Chili: Imprenta Universitaria, 1923.

This quarto volume of 144 pages is the second of a publication under the general title *Quinta Conferencia Internacional Americana* and consists of an historical sketch of the codification of international law in America from the Congress of Panama in 1826 to the present time, including the texts of the five projects provisionally approved by the Third Commission of the Fifth International American Conference of which Dr. Alvarez was the reporter (*ponente*), as well as other projects advocated by him and a plan for the codification of international law.

BOOKS RECEIVED.[1]

Anglo-American Relations during the Spanish-American War. By Bertha Ann Reuter, Associate Professor in Wesleyan College, Georgia. New York: The MacMillan Company. 1924. pp. viii, 208. $1.75.

[1] Mention here does not preclude an extended notice in a later issue of the JOURNAL.

Au service des Prisonniers de Guerre, 1914–1919. By A. d'Anthouard. Paris: Librairie Bloud & Gay. 1924. pp. vii, 239.

Les Bombardements Aériens. By J. Bouruet-Aubertot. Paris: Les Presses Universitaires de France. 1923. pp. 102. 5 fr.

Don Manuel Eduardo de Gorostiza y la Cuestion de Texas. By Antonio de la Peña y Reyes. Mexico: Publicaciones de la Secretaria de Relaciones Exteriores. 1924. pp. 206.

L'Entrée de la Suisse dans la Société des Nations. By William E. Rappard. Geneva: S. A. des Éditions Sonor. 1924. pp. iv, 81.

Les Finances de la Société des Nations. By H. F. A. Völlmar. The Hague: Martinus Nijhoff. 1924. pp. xii, 116.

Le Droit des Armoiries. Essai de Systématisation et de Construction Théorique. By Pierre J. Nisot. Brussels: P. Dykmans, 1924. pp. 189.

Le Droit International des Communications. Cours professé à l'Institut des Hautes Etudes Internationales de Paris (1921 et 1923). By Charles de Visscher. Ghent: Librairie Moderne, A. Buyens. Paris: A. Rousseau. pp. 151.

Citizenship. By W. H. Hadow, Vice-Chancellor of Sheffield University. New York: Oxford University Press (American Branch), 1923. pp. x, 240. $2.00.

Le Droit Pénal de la Rhénanie Occupée. By Pierre Huguet. Paris: Les Presses Universitaires de France. 1923. pp. 247.

Immunity of State Ships: As a contribution towards unification of the laws on the subject. By Dr. N. Matsunami, Professor of Tokyo University. London: Richard Flint & Company. 1924. pp. xv, 208.

International Law for Naval Officers. By Commander C. C. Soule and Lieutenant Commander C. McCauley. Annapolis: Naval Institute. 1923. pp. 183.

Legislacion Internacional del Aire. By Luis Machado. Habana: Imprenta "El Siglo XX". 1923. pp. 27.

The Monroe Doctrine Centenary. Addresses delivered at the Brazilian Society of International Law's solemn session, on 2 December 1923, in commemoration of the first centenary of President James Monroe's declaration of principles. Rio de Janeiro: Typ. do *Jornal do Commercio*, de Rodrigues & C. 1924. pp. 68.

The Neutral Investigation of the Causes of Wars. By Herman Harris Aall. Kristiania: Herman Harris Aall. 1923. pp. 161, xiv.

A New American Commercial Policy. By Wallace McClure. New York: Columbia University. 1924. pp. 397. $4.00.

New Governments of Central Europe. By Malbone W. Graham, Jr., University of Texas, assisted by Robert C. Binkley, Stanford University. New York: Henry Holt and Co. 1924. pp. x, 683.

L'Ordinamento Politico e Giuridico della Repubblica di San Marino e la sua Situazione Internazionale. By Professor A. Sottile. San Marino: Arti Grafiche Sammarinesi. 1923. pp. 36.

Our Foreign Affairs. By Paul Scott Mowrer. New York: E. P. Dutton & Co., 1924. pp. xii, 348. $3.50.

Prisoners of War. By Herbert C. Fooks. Federalsburg, Maryland: J. W. Stowell Printing Co., 1924. pp. xxiv, 456. il.

Problem of the Pacific and the New Policies of Bolivia. By Luis Barros Borgoño, together with two juridical reports by John W. Davis. Baltimore: The Sun Job Printing Office. 1924. pp. vii, 191.

La Procédure de Compensation: Contribution a la Critique du Traité de Versailles et de son Exécution. By Dr. Arthur Nussbaum. Tübingen: J. C. B. Mohr (Paul Siebeck). 1923. pp. 48.

Raw Materials and Foodstuffs in the Commerical Policies of Nations. By William S. Culbertson. Philadelphia: The American Academy of Political and Social Science. 1924. pp. v, 298.

The Reasonableness of the Law: The Adaptability of Legal Sanctions to the Needs of Society. By Charles W. Bacon and Franklyn S. Morse, with an Introduction by James A. Woodburn. New York: G. P. Putnam's Sons. 1924. pp. xii, 400.

Die Satzung des Völkerbundes. By Walther Schücking and Hans Wehberg. Berlin: Verlag von Franz Vahlen. 1924. pp. xxvii, 794.

A Short History of International Intercourse. By C. Delisle Burns. New York: Oxford University Press (American Branch), 1924. pp. 159.

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